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No. 07-74

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In The

Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS – N. PROVIDENCE, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, and UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

This Court has held that the three tier liquor distribution system (producers, wholesalers, and retailers) existing by law in many states is "unquestionably legitimate." As relevant here, Rhode Island regulates that system by, *inter alia*, prohibiting any liquor retailer from forming a chain store or franchise with other retailers. Rhode Island's one-store limit applies neutrally and evenhandedly in purpose and effect to both in-state and out-of-state entities. To enforce its ban, among other things, the State prevents price fixing in the form of common or coordinated advertising and use of the same name – both actions the result of the prohibited collusive action in the marketplace. The First Circuit's holdings twice sustaining the ban were limited to the retail alcoholic beverage industry and upheld the ban under both the Twenty-first Amendment and the State's traditional police power.

Accordingly, the questions presented are:

1. Whether a State may structure its retail liquor distribution system to outlaw chain stores and franchises?

2. Whether a State's retail liquor chain store and franchise prohibition – which treats in-state and out-of-state license holders evenhandedly in purpose and effect – implicates the Commerce Clause?

3. Whether a State may prohibit price fixing schemes by liquor retailers by banning advertisement of the results of such collusion – called "joint advertising" and "shared use of trade name" by Petitioners?

COUNTERSTATEMENT OF THE QUESTION PRESENTED – Continued

4. Whether Petitioners' belated arguments concerning Rhode Island's residency requirement are not worthy of certiorari because, as the First Circuit affirmed, Petitioners have no standing to raise them?

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OPINIONS BELOW

In addition to the opinions noted by the Petitioners, there have been two reported decisions denying preliminary injunctive relief issued during the course of this litigation: *Wine and Spirits Retailers, Inc. v. State of Rhode Island,* 364 F. Supp. 2d 172 (D.R.I. 2005), *aff'd, Wine and Spirits Retailers, Inc. v. State of Rhode Island,* 418 F.3d 36 (1st Cir. 2005). The Court may also note the decisions rendered in the administrative proceedings ongoing in the State courts, provided in an Appendix ("App.") attached hereto.

STATEMENT OF THE CASE

Petitioners challenge Rhode Island's seventy-four year old law forbidding chain stores from holding Class A licenses, which allow the retail sale of alcoholic beverages to the public. This case began with a scattergun approach.[1] Petitioners initially alleged that the prohibition against Class "A" licenses being held by chain or franchise stores violated the First Amendment's guarantee of free speech, assembly, and something called "unfettered discretion." In what then seemed to be an afterthought, Petitioners also claimed that the law violated the Commerce Clause, the Fifth Amendment, the Fourteenth Amendment and 42 U.S.C. § 1983.

At this level, Petitioners focus on the Commerce Clause and its applicability to the present dispute. Specifically, Petitioners now claim that the requirement that the holders of a Class A license be Rhode Island residents violates the Commerce Clause, and that the restriction that only a single license may be held by any one person or corporation, wherever

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[1] In its decision granting judgment in the State's favor, the trial court observed that "The plaintiffs have brought a seven-count Complaint that the Rhode Island statute prohibiting chain store organizations and franchise operations from engaging in retail sale of alcoholic beverages violates nearly every provision of the Constitution except the guarantee of the right to bear arms and the prohibition against cruel and unusual punishment." (Petitioners' Appendix 28, hereinafter referred to as "Pet. App.").

situated, impermissibly regulates extraterritorially. They also continue to argue that the State's disinclination to allow joint advertising, consisting of identical ads offering the same products for the same prices, and the use of identical trade names, banners, logos, and much more, violates their First Amendment rights.

Rhode Island General Laws § 3-5-11.1, as amended, provides that Class A licenses[2] shall not be granted, issued or transferred to any chain store organization. That law lists certain activities that may result in a finding that an organization is a chain, and cannot hold a Class A license. Petitioners mischaracterize the above list as establishing absolute prohibitions against the cited activity. A simple reading of the statute makes clear that is not correct – subsections (1)(a)-(f) simply provide indicia of chain store ownership that the State may consider when determining whether stores have violated the law. Petitioners also doggedly mischaracterize the purpose of Rhode Island's legislative scheme regulating alcoholic beverages. The actual purpose is clearly stated in Title 3 of the Rhode Island General Laws. The overarching purpose of the entire liquor regulatory scheme is " . . . the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. The specific purpose of the Amendment, as articulated by Rhode Island's General Assembly, is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a).

Section 3-5-10 of the Rhode Island General Laws requires that, in order to hold a retail liquor license in Rhode Island, one must be a Rhode Island resident or corporation. Finally, section 3-5-11 makes it clear that liquor stores inside and outside of the state are counted for purposes of determining whether the one store licensing limit applies.

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[2] Class A licenses are issued to retail package liquor stores. R.I. Gen. Laws §§ 3-7-1, 3-7-3.

Initially, Wine and Spirits Retailers, Inc. (as franchisor, hereinafter "W&SR") and John Haronian (as principal of W&SR, and who directs the business activities of the stores), sought a preliminary injunction against enforcement of the statute, which was denied. *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 364 F. Supp. 2d 172 (D.R.I. 2005). Receiving evidence that the joint advertisements were placed after representatives from the stores met monthly to determine what products they would sell at what agreed-upon prices, the District Court in a strongly worded decision found that the law did not "in any way" prevent W&SR from providing paid marketing and management advice, as claimed in the Complaint and moving papers. The Court explained

> What [the prohibition on joint advertising] prohibits is concerted activity on the part of Class A licensees to engage in such practices. W&SR does not hold a Class A license and remains free to provide licensees with planning and/or marketing advice which, during the hearing, it described as advice regarding marketing, methods of doing business, what products to sell, and how to set up a store.

364 F. Supp. 2d at 176. The Court refused to approve the blatant price-fixing agreements that formed the foundation for the joint advertisements.

The Court found that W&SR was "free to provide marketing and management advice and even advice regarding coordinated planning and implementation of marketing strategies." *Id.* at 177. The prohibition, as described by the Court, was to prevent "Class A licensees from acting in concert to engage in such activities." *Id.* The Court found that the First Amendment did not have any application to the activity engaged in by W&SR, holding that the ban only applied to common advertising by Class A license holders. The District Court held that the prohibition affected only "the *concerted activity* of placing *common* advertisements which the evidence shows requires agreement among licensees with respect to what products will be advertised and what price will be charged for those products." *Id.* (emphasis in original). The trial court determined that the activity at

play here was not speech, but conduct consisting of "anti-competitive commercial practices." *Id.*

The denials of the Preliminary Injunction requests were appealed, resulting in a decision affirming the District Court. *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 418 F.3d 36 (1st Cir. 2005). The First Circuit correctly characterized the legislation as "tantamount to an antitrust law," the constitutionality of which "is not open to debate." *Id.* at 51. Judge Selya captured the State's argument in a nutshell: "While the State cannot regulate the right of speakers to band together to convey a common message in the marketplace of ideas, it most assuredly can exercise control over the efforts of market players to exploit the principle of strength in numbers in the marketplace of goods." The fact that the relationship involved included components of communication was held not to warrant "overriding the State's historic right to regulate market forces in the retail liquor industry." 418 F.3d at 53. The Court found no First Amendment or Equal Protection violations based upon the activities of W&SR or Haronian – even though they tried to assert the rights of the franchisee stores.

The Complaint was subsequently amended to add three store plaintiffs.[3] The new plaintiffs moved for a preliminary injunction, which was denied. No appeal followed. After a bench trial, the District Court issued a decision unequivocally rejecting all constitutional arguments pressed by the Petitioners. *Wine and Spirit Retailers, Inc. v. State of Rhode Island*, No. 04-418T (July 19, 2006) (Pet. App. 27). The facts elicited at trial did not support any of the serious constitutional accusations that were flung at the State. The trial judge characterized the evidence offered by the Petitioners as "patently incredible." (Pet. App. 38). Conversely, the State proved that an impermissible, anti-consumer chain store existed, and that it was conduct, not speech or interstate commerce that was targeted by the statutes. The facts

[3] All franchisee stores associated with W&SR are named "Douglas Wine & Spirits" or "Peoples' Liquor Warehouse." W&SR does not do business outside of that family.

established at trial showed that at the time the law was passed, W&SR had franchise agreements with stores in Rhode Island and Massachusetts, dictating everything from location to permitted suppliers to color schemes and layout of the floor plans. The stores clearly did not control their day-to-day business. Other facts elicited at trial established that John Haronian is President and sole owner of W&SR. W&SR does not provide any services for any stores other than Douglas Wine and Spirits or Peoples' Liquor Warehouse stores. (C.A. App. 73, 262).[4] W&SR is a Rhode Island corporation. W&SR does not intend to attempt to obtain a Class A license for itself. John Haronian does not want to own a liquor store in Rhode Island. (C.A. App. 74).

The relationship of the stores and the individuals, if diagramed like a tree, would not have many branches. As stated above, John Haronian is the sole corporate office holder in both W&SR and Tri-State, a management company that oversees the day-to-day operations of the stores. (C.A. App. 73).[5] The Rhode Island stores are all owned by friends or family of John Haronian.[6]

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[4] The Appendix provided to the First Circuit is designated as "C.A. App.".

[5] Additionally, Haronian has what he termed "an interest" in three Massachusetts liquor stores – a Douglas Wine and Spirits in Fairhaven, a Douglas Wine and Spirits in New Bedford, and a Peoples' Liquor Warehouse in Fall River, owned by a corporation of which he is the sole shareholder. (C.A. App. 79). His daughter, Shirley Santoro, owns one of the W&SR's Massachusetts potential franchisees, Douglas Wine and Spirits *dba* Tanza Liquors. (C.A. App. 75). The Massachusetts Alcoholic Beverage Control Commission has rejected the application for a franchise relationship because of the excessively intertwined nature of the individuals and the businesses. http://www.mass.gov/Abcc/administration/decisions/10052005_tanzaliquors.htm. A case almost identical to the one *sub judice* was brought before the United States District Court for the District of Massachusetts, *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200 (D.Mass. 2006). That case was recently dismissed. *See* discussion, *infra*.

[6] The Cranston store is owned by Ron Bochner, who bought it from Haronian's daughter, Lynn Finn. (C.A. App. 84). The Cumberland store is owned by Haronian's son-in-law Joseph Santoro. (C.A. App. 85). The

(Continued on following page)

The stores do not set their own prices on the 7,000-8,000 products that they sell. That is done at W&SR's offices in North Providence, at an address shared with Tri-State Management. (C.A. App. 102, 164). W&SR tells the stores what products are going on sale when, and instructs them on product placement within the store. (C.A. App. 93, 94, 113, 114, 119, 165). Identical posters are located in the windows of the stores. (C.A. App. 95).

Haronian offered insight into the business plan preferred by his organization, the franchise operation he wishes to resume. (C.A. App. 111). Prior to the 2004 amendment, the "franchisees" attended monthly meetings and agreed on what price a product would be sold for before the joint advertisements could be placed. (C.A. App. 91). They had to do that before the advertisement could go in the paper because they would all honor the price once it went into the newspaper. (C.A. App. 92). Petitioners have grudgingly changed the procedure somewhat, with each

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store in Johnston, Rhode Island, located on Route 44 is owned by Meredith Bochner, who is married to the owner of the Cranston store. (C.A. App. 85). DWS Johnston, a separate store from the Route 44 Johnston store, is owned by a trust, the beneficiary of which is Tyler Santoro, daughter of Joseph and Shirley. (C.A. App. 85). The North Providence store is owned by Kathleen Haronian, another daughter, who also serves as Vice-President of Tri-State. (C.A. App. 86). The store on Route 10 is owned by John's wife, Emily. (C.A. App. 86). Haronian's daughter Lynn Finn presently owns the Peoples' Liquor Warehouse in Hopkinton, and is also employed by Tri-State. (C.A. App. 87). The PLW in Apponaug is owned by a trust, the beneficiary of which is grandson Jonathan Santoro. (C.A. App. 87). The North Smithfield store is owned by a trust, the beneficiary of which is grandson Kyle Finn. (C.A. App. 87). The East Providence store is owned by a trust, the beneficiary is grandson Jared Santoro. (C.A. App. 87). (The trust arrangement appears to violate another subsection of 3-5-10, which prohibits ownership of a Class A license by a trust). A Pawtucket store is owned by Craig Power, who works for Haronian at W&SR as a Vice-President. (C.A. App. 87-88). Several of the stores are located in buildings owned by family members. Also, evidence indicated that stores shuffle employees. For example, Victor Correia, the only store representative offered at trial, has worked at five different DWS locations. (C.A. App. 157, 158).

store being presented with an advertisement that has been created by the W&SR marketing department, with product and price already in the draft copy of the advertisement. There is no participation in setting the prices on the products at the store level, however. (C.A. App. 164). Likewise, each store displays identical window signs containing the Douglas logo, sometimes directing the customer to "www.douglaswines.com." That address takes a customer to a website where orders are filled by the North Providence store, no matter where the customer saw the sign. (C.A. App. 97). Employees at all stores dress in an identical fashion, all wearing the "Douglas" logo, without any store designation. (C.A. App. 107). Stores also provide shopping carts emblazoned with the Douglas logo, with no differentiation as to the individual store. (C.A. App. 107).

Prior to the 2004 amendments, the stores would purchase products from wholesalers jointly. They would be offered discounts because of the quantity purchased. The discounts were determined by the joint purchase of the eleven franchisees, not by what each individual store purchased. (C.A. App. 101). That has changed since the amendment, with each store purchasing from the wholesalers on an individual basis. However, negotiations as to price on a product is still done by representatives from W&SR. W&SR instructs the stores as to what products they will carry. They do not use suggestive language, rather, the memos are clearly directives. One such memorandum instructs all of the stores that they "CANNOT" make their own decisions on a particular issue. W&SR wishes to return to the original way of doing business as they did prior to the amendments. (C.A. App. 111).

After the amendment, the State's Department of Business Regulation issued a bulletin specific to the issue of store names. (C.A. App. 103-105). Examples of what was permissible, and what was not, were contained in the bulletin. (C.A. App. 105-106). Despite the suggestion that license holders call with any questions, no representative from any of the Petitioners contacted the State regarding their similar names. Instead, they changed their name to

be *more* similar than prior to the issuance of the bulletin. (C.A. App. 105, 106). The State issued a more specific bulletin, specifying that a mere geographic delineation was not sufficient under the law. (C.A. App. 218-220). Petitioners ignored the bulletin. All other Rhode Island Class A license holders have complied with the amended law. (C.A. App. 216). State proceedings are ongoing in order to have the stores comply with the law. (App. 11, 43).

The District Court determined that the regulatory scheme was aimed at anticompetitive, collusive conduct and not speech, and had no extraterritorial reach. The Court further held that no Petitioner had standing to challenge the residency requirement, and that its validity did not impact on the chain store prohibition. The Court concluded that the statute did not violate any provision of the United States Constitution and was thus enforceable. The First Circuit affirmed, holding that, at every turn, Petitioners failed to shoulder their burden of proof.

SUMMARY OF ARGUMENT

There is no reason to grant the instant Petition for Writ of Certiorari since none of the issues pressed are worthy of this Court's consideration and since there is no tension between the First Circuit's decision and that of any other Circuit or of any decision by this Court. The instant case is remarkable only for the lack of foundation for Petitioners' claims – they offered no proof to support any of their grandiose claims, and what little evidence was offered was deemed "patently incredible" by the trier of fact. Since they did not contest these findings at the Appellate level, they stand at this level. Quite significant are the rulings by the trial and Appellate courts that Petitioners lack standing to press the Commerce Clause claims they now seek to have this Court consider.

As for the merits, the most serious flaw in every facet of the Petitioners' case is the lack of proof to substantiate any of their constitutional claims. They simply failed to offer evidence to prove their case, relying instead on arguments more suited for the academic arena than the

adversarial process of litigation, or, as Judge Selya described it, a "rodomontade."[7] (Pet. App. 25). As the Circuit put it, their First Amendment claim was "extravagant" and "lacked force" (Pet. App. 8); their argument regarding shared trade names did not "survive scrutiny" (Pet. App. 12), and indeed that the findings of the trial court – including that the use of shared trade names was misleading – were not even contested by the Petitioners. (Pet. App. 13). As to the Commerce Clause dissertations offered by the Petitioners, Judge Selya wrote that they failed to show any cognizable harm, direct or indirect, attributable to the residency requirements (Pet. App. 18); and that the "brazen claim" made by Petitioners of a discriminatory purpose was supported only by "isolated snippets" of statements made by counsel, but not by any evidence. Discarding the Commerce Clause argument relative to discriminatory purpose, Judge Selya wrote that Petitioners' case "elevated hope over reason." (Pet. App. 21). In rejecting their claim of discriminatory effect, the Circuit wrote that the Petitioners failed to offer compelling evidence of such an effect. "There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restriction, nor is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions. The absence of any such evidence is telling." (Pet. App. 22). As to the allegations of an impermissible territorial reach, the Circuit wrote that it was supported only by "sketchy arguments," and that Petitioners had "not come close to showing that the burdens they envision are excessive in relation to the statutory scheme's legitimate goals." (Pet. App. 23-24).

There is absolutely no factual basis for the claims made in the Petition concerning Rhode Island's retail liquor industry. (Petition at 2-6). Petitioners' arguments concerning "big-box stores" and something they term a "sheltered market" are simply arguments, continuing their

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[7] "Vainglorious boasting or bragging; pretentious, blustering talk." Dictionary.com Unabridged (v.1.1 2007).

habit of making statements without any evidentiary foundation. Also, they ignore the decisions that led us to this point, and the attempt by the courts below to outline what they *can* do, as well as what they cannot do. One example is the statement in the Petition at page 9: "Stores cannot adopt business efficiencies developed by other retailers." The District Court instructed them over two years ago that the franchisor, Wine and Spirits Retailers "remains free to provide licensees with planning and/or marketing advice which, during the hearing, it described as advice regarding marketing, methods of doing business, what products to sell, and how to set up a store." 364 F. Supp. 2d at 176. Also, continuing the practice of inserting completely new arguments into this case at every turn, the Petition, part II, contains material and argument never submitted to either the District or Circuit courts. This Court should thus give no consideration to these materials, or this argument.

Simply put, Petitioners failed to prove that they engage in activity that is protected by any provision of the United States Constitution. What was shown was a tightly interrelated chain of stores engaged in employee sharing, price fixing, product restrictions and general anti-competitive, collusive conduct. The law is aimed at curbing this harmful conduct, and not protected speech or interstate commerce. To give any credence to Petitioners' arguments would be to do a great injustice to expression that rightly deserves Constitutional protection.

ARGUMENT

I. Rhode Island Has Extensive Authority To Regulate The Business Of Selling Alcoholic Beverages.

Any consideration of the validity of Rhode Island's regulation of the sales of alcoholic beverages must acknowledge the State's significant power in this area. Since its passage in 1933, the Twenty-first Amendment has been deemed to confer broad powers on the states in the area of liquor regulation. *California Retail Liquor Dealers Assoc. v. MidCal Aluminum, Inc.*, 445 U.S. 97 (1980). Although the

States acknowledge that the sale of alcoholic beverages is lawful, it is regarded as "a thing apart, a commodity with a potential for social harm unlike cabbages and candlesticks. . . ." *Granite State Grocers Assoc. v. State Liquor Comm'n.*, 289 A.2d 399 (N.H. 1972).

Immediately after passage of the Twenty-first Amendment, the State of Rhode Island established a regulatory scheme to oversee the business of selling alcoholic beverages. The overarching purpose is " . . . the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. The specific purpose of the 2004 amendments is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11(a).

The State of Rhode Island regulates the alcoholic beverage industry using the "unquestionably legitimate" three tier distribution system. *North Dakota v. United States*, 495 U.S. 423 (1990); *Granholm v. Heald*, 544 U.S. 460 (2005). It is clear that within the area of its jurisdiction, the State has virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system. *Id.* Ensuring orderly market conditions in the industry is a core interest served by the Twenty-first Amendment. *Id.* The Twenty-first Amendment has been construed as "grant[ing] the State virtually complete control over whether to permit importation or sale of liquor *and how to structure the liquor distribution system." Midcal, supra,* 445 U.S. at 110 (emphasis supplied).

In reviewing the *raison d'etre* for the administrative body overseeing the alcoholic beverage industry, the Rhode Island Supreme Court said in 1934 that it "was created for the purpose of regulating and controlling a business which experience has taught must be strictly controlled in the interest of public health, morals, and safety. The public has therefore a vital interest in the determination of the manner in which the alcoholic beverage commission

should perform the duties imposed upon it by the statute. . . ." *Clark v. Alcoholic Beverage Comm'n*, 170 A. 79 (1934). Several years later, the State's highest Court again examined the necessity for the State's close regulation of the sales of alcoholic beverages. In *Baginski v. Alcoholic Beverage Comm'n*, 4 A.2d 265 (1939), our Supreme Court explained that the statutes were a "familiar and well-recognized example of the legitimate exercise of the police power. The act is entitled an act to promote temperance and to control the manufacture, transportation, possession and sale of alcoholic beverages. Its chief purpose may, without question, be said to be the safeguarding of the public health, safety and morals." 4 A.2d at 266-67. The Rhode Island Supreme Court continued, stating:

> The traffic in intoxicating liquors has ever been a prolific source of evils, gravely injurious to the public welfare. The need of its regulation and control is undisputed. In a search for a system of effective, impartial and uniform regulation and control of this traffic our legislature enacted the above chapter which was later amended. . . .

Id. at 267.

Since the repeal of prohibition, the State of Rhode Island has determined that liquor retailers should not be allowed to do business as "chain store organizations." R.I. Gen. Laws §§ 3-5-10, 3-5-11. Until 2004, the statutory scheme did not contain a specific listing of the indicia of a chain store organization. At that time, the General Assembly amended the statute, outlining several factors that would weigh in favor of a finding that a chain store organization existed. The amendment also prohibited franchise relationships in the retail liquor industry.

The First Circuit likened the 2004 amendments to antitrust laws, which are the "Magna Carta of free enterprise." *Midcal*, *supra*. (Pet. App. 69). The State clearly has a compelling interest in prohibiting anticompetitive, collusive conduct, of the type described at the trial of this case. It is axiomatic that any conspiracy that has an impact on the price structure of any category of goods is illegal.

Schnapps Shop, Inc. v. H.W. Wright & Co., Ltd., 377 F. Supp. 570 (D.Md. 1973). The evidence at trial showed that representatives from stores routinely met to fix prices, and they still do it, albeit in a more vertical fashion. Where a party shows a *per se* violation of the antitrust laws, such as price-fixing, no further proof of public injury is required. *Id.* The First Circuit recognized the State's "historic right to regulate market forces in the retail liquor industry." (Pet. App. 72).

The decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) makes it clear that the State can, and must, prohibit the "business plan" touted by Petitioners. In *Giboney*, this Court rejected arguments that union picketing was protected by the First Amendment against action based on an anticompetition statute. Nearly sixty years ago, Justice Black wrote: "That states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question." 336 U.S. at 495. That statute, like this one, was upheld because its purpose is to secure competition and preclude combinations that tend to defeat it. At that early date, this Court recognized that "it is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions." *Id.* at 496 (citation omitted). The holding that the union picketing did not enjoy protection so as to invalidate the anticompetition statute rested on the premise that "legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general." *Id.* at 497. In rejecting the claim that the picketers were simply trying to get a message across, this Court acknowledged:

> It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced,

> or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Id. at 502.

Since it was "clear that the [picketers] were doing more than exercising a right of free speech or press," rather, they were "exercising their economic power together with that of their allies" the constitutional challenge failed. Even outside of the alcoholic beverage industry, the harmful effects of franchising can be lessened by state regulation. *See Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1994).

II. The Commerce Clause Is Not Implicated By Rhode Island's Chain Store Prohibition, Which Counts All Retail Liquor Licenses In Determining Whether A "Chain" Exists, Regardless Of Location. Furthermore, Petitioners Lack Standing To Challenge The Residency Requirement For Class A License Holders.

A. Petitioners Lack Standing.

Petitioners allege that R.I. Gen. Laws § 3-5-10's residency requirement and § 3-5-11, prohibiting owners of liquor stores in other states from obtaining a Class A license in Rhode Island, violate the Commerce Clause found in Article I, sec. 8 of the United States Constitution.[8] At the outset, it must be determined whether there is

[8] The Commerce Clause allegations were so undeveloped during the course of this case that Judge Torres, who had presided over the case for two years since its filing, was unaware that they existed until the first day of trial. (C.A. App. 26).

Article III jurisdiction as to that Count. Clearly, there is not, since the Petitioners are either Rhode Island residents or corporations, and there is no claim that any have sought or have been refused a Class A license for any reason. (C.A. App. 74). *See Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440 (D.R.I. 1985); *McCollester v. City of Keene, N.H.*, 668 F.2d 617 (1st Cir. 1982). Evidence offered at trial indicated that John Haronian is a Rhode Island resident with no desire to obtain a Class A license and that the corporate plaintiffs are all Rhode Island corporations (C.A. App. 74). There is no resident of any other state who has sought, or who has even considered seeking, a Class A license in Rhode Island. The District Court recognized this and also found that the residency requirement lent no support to the Commerce Clause argument, since

> . . . whether a non-resident may obtain a Class A license has nothing whatever to do with the prohibition against chain stores and franchises, because even if an out-of-state entity could obtain a Class A license, it, like local Class A licensees, still would be prohibited from operating a chain store or participating in a franchise operation. So whether it is or is not constitutional for Rhode Island to only grant Class A licenses to local entities has no bearing whatsoever on the validity of the prohibition against franchises and chain stores.

(Pet. App. 43).

Petitioners cite First Amendment overbreadth law for the untenable proposition that they may assert the constitutional rights of an unknown and undefined class of nonresidents who may at some point wish to obtain a Class A license in Rhode Island. This Court has not extended the notions of standing quite so far. All of the cases relied upon by the Petitioners in support of their standing argument found a legally cognizable injury suffered by *somebody* sufficient to invoke the jurisdiction of the federal court. That is not the case here. These parties wish to have an advisory opinion from this Court, with no concrete "case or controversy" to support it.

Indeed, a finding that there is standing as to this issue, and that this small part of the statute violates the Commerce Clause would give these Petitioners little relief,

since it would not void the prohibitions on chain stores or franchises. *See* R.I. Gen. Laws § 3-1-6 (severability clause). Since this Court is not in the business of rendering advisory opinions, and given the caveat on avoiding constitutional issues when possible, the residency requirement attack should fail at the outset.

B. The Commerce Clause Is Not Implicated.

This Court should not grant this Petition based on the Commerce Clause arguments concocted by the Petitioners because they go far beyond the allegations of their Complaint and the scope of the record before the trial court. The Amended Complaint simply alleges that the residency requirement of R.I. Gen. Laws § 3-5-10 "restricts the ability of out of state individuals to do business within Rhode Island" and therefore discriminates against interstate commerce. The Amended Complaint also alleges, as to § 3-5-11, that Rhode Island "prohibits owners of liquor stores in other states from obtaining Class A license in Rhode Island" and therefore "discriminates against interstate commerce in violation of the Commerce Clause." (App. 6). Petitioners should be held to their pleadings and should not be allowed to interject new arguments into this case at this juncture.

The District Court found that these Appellants did not "even come close" to proving a Commerce Clause claim. (Pet. App. 40). After finding that there was no standing to attack the residency requirement, the trial court determined that the Twenty-first Amendment had some application to the single Class A license limitation. First, the District Court found that "The statute by its terms applies across the board regardless of whether the franchisee is local or out-of-state. Nor have the plaintiffs presented any evidence that despite their facial neutrality these sections have the practical effect of discriminating against out-of-state sellers." (Pet. App. 41). Not surprisingly, the District Court found that the Appellants had misread and misapplied the decision in *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), since Rhode Island had not conferred any

competitive advantage on in-state sellers over out-of-state sellers – both categories are limited to holding only one Class A license. "[T]he statute contains no exemption for local liquor stores. They're not exempt from the prohibition against franchising or operating chain store organizations. . . ." (Pet. App. 42). Finding that the limitation applied evenhandedly, the Court rejected the Commerce Clause claim.

After the First Circuit found that the Petitioners lacked standing to challenge the residency requirement, they addressed the sweeping claims that the overall statutory scheme was motivated by a discriminatory purpose and had an impermissible extraterritorial reach, finding both arguments to be unpersuasive. After first noting that the Petitioners had the burden of proving that the statute was prompted by a discriminatory purpose, the Circuit found that Petitioners' entire case as to discriminatory purpose was contained in "isolated snippets" of responses to discovery questions. (Pet. App. 19). The First Circuit declined to make the "quantum leap" required to accept Petitioners' arguments on this issue, instead looking to the words of the statute to determine its purpose. The purpose of the 2004 amendments is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a). The Circuit held that the Petitioners did not offer any convincing reason for doubting these formal statements of legislative purpose. (Pet. App. 20).

Next, the Circuit addressed the claims of discriminatory effect, and found Petitioners' interpretation of its decision in *Walgreen Co. v. Rullan*, *supra*, "overly expansive." (Pet. App. 21). In rejecting that the instant case bore any resemblance to *Walgreen*, the Circuit wrote that

> . . . the plaintiffs adduced no evidence that the prohibition on franchise and chain-store arrangements, in itself, has had, or threatens to have, a debilitating or unfair impact either on competition or – leaving aside residency requirements – on out-of-state enterprises in particular.

> There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restrictions, or is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions.

(Pet. App. 21, 22).

Finally, the Circuit rejected the "sketchy" arguments offered as to the statute's impermissible territorial reach, recognizing that "the district court did not address this claim, presumably due to shortcomings in the manner of its presentment. Even assuming that this argument was squarely presented, it does not profit the plaintiffs' cause." (Pet. App. 23). Instead, they found that the chain store prohibition was "neutral" and "evenhanded." (Pet. App. 24). Continuing the theme that the Petitioners failed miserably in offering proof to support their claims, the Circuit wrote that "[t]he plaintiffs have the obligation of proving excessiveness, and they have not come close to showing that the burdens they envision are excessive in relation to the statutory scheme's legitimate goals," and noted that this Court "previously has rejected the notion that the dormant Commerce Clause protects particular business structures or methods of operation." (Pet. App. 24).

The decision of the First Circuit is in harmony with this Court's recent decision in *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, ___ U.S. ___, 127 S.Ct. 1786 (2007). That case made it clear that laws that treat private businesses, "whether in state or out-of-state, exactly the same, do not discriminate against interstate commerce for purposes of the Commerce Clause." ___ U.S. ___, 127 S.Ct. at 1790, 1797. Since the decision of the First Circuit is in full accord with the most recent teachings of this Court on the subject of the Commerce Clause, there are no grounds to grant certiorari.

III. The Statute At Issue Is Aimed At Conduct, Not Speech, Therefore, The First Amendment Is Not Implicated.

At every turn, the lower courts emphasized that the statute targeted conduct, not speech. Petitioners refuse to accept this finding. Testimony offered by John Haronian, describing the monthly meetings where store representatives met to set prices on products, led to this conclusion. The First Circuit correctly found that the chain store prohibition does not target speech because "each individual licensee remains at liberty to disseminate information about its prices and products to other stores and to the public at large. . . . This statute merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial strategies. Such is not a ban on commercial speech." (Pet. App. 8). Just because these Petitioners stubbornly insist that the First Amendment protects their collusive activities does not make it so.

This Court has rejected outright a claim that conduct that has incidental elements of speech is entitled to any First Amendment protection. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, ___ U.S. ___, 126 S.Ct. 1297 (2006), the Court addressed complaints that the "Solomon Amendment" requiring that military recruiters be given access to college campuses, was "compelled speech" in violation of the First Amendment. The Court found that the "speech" involved was

> plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed'

Id. at 1308. The following mandates a finding that Petitioners' position is without merit:

> Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only"

> hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.

Id. at 1308, citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

In *Rumsfeld,* this Court chastised the challengers, stating that their position "trivializes" the freedoms protected by the Constitution and prior precedent. "In this case, [petitioner] has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." The argument was found to "plainly overstate[] the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents." 126 S.Ct. at 1313. This holding is entirely consistent with prior Supreme Court precedent. For example, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court found no element of protected expression in sexual activity at a book store. There, the Justices found the store's argument too restrictive, "since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." Continuing, the Court reminded that the Constitution does not

> traditionally subject[] every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a *significant* expressive element that drew the legal remedy in the first place, as in *United States v. O'Brien*, 391 U.S. 367 (1968) or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity. *O'Brien* has no relevance to a statute directed at imposing sanctions on non-expressive activity.

Id. (emphasis supplied). Clearly, Rhode Island's ban on "coordinated or common" advertising is not aimed at

Petitioners' protected speech. The activity curbed is that which is necessary for the joint advertising to occur, namely the stores' collusive agreements regarding prices and product. This is well within the State's regulatory power.

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), the First Circuit refused to invalidate regulations aimed at non-communicative impact, notwithstanding a degree of adverse impact on communication. *Wirzburger* first found that citizens' use of the ballot initiative process constituted expressive conduct. However, the decision also correctly found that the regulation in question was not aimed at regulating speech. The Circuit wrote that government actions that are aimed at some goal other than restricting the conveyance of ideas are generally permissible even if they incidentally inhibit free speech. Enforcement of a prohibition with only incidental effects was found not to implicate the First Amendment, and such a law is measured only by a rationality standard.

Petitioners' attempt to shoehorn this case into a commercial speech dispute should fail. Commercial speech is the transmission of the notion that a party wishes to sell a product for a certain price. This type of speech is simply not affected by any state law or regulation at issue. What is prohibited is the joint activity of agreeing to sell a product at a particular price and then publishing the result of this collusive agreement to consumers.

Even applying the commercial speech test, however, Petitioners lose. Commercial speech, protected to some degree by the First Amendment, consists of the "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001). Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." *Pharmaceutical Care Mgmt. Assoc. v. Rowe*, 429 F.3d 294 (1st Cir. 2005). This case does not prohibit the disclosure of any economic information to consumers. Rather, it prohibits the agreement that necessarily precedes a joint advertisement about price and product. It also prohibits the communication

that the parties are engaged in illegal activity – a chain store operation. The statutes further an important governmental interest, discussed *supra,* and do so as narrowly as possible. All information is allowed; the manner in which it is transmitted is the only action regulated.

The basis for both the trial court and Circuit's decision is the misleading nature of the use of the "Douglas" name. At trial, John Haronian testified that each store was independently owned and operated, yet they fly the same banner, use the same colors, place for sale the same advertisements, use identical in-store flyers touting the same products for the same prices, sold by employees dressed in the same "Douglas" garb. False testimony that the stores are independent in light of these facts (which emphasize the "conduct v. speech" dichotomy) highlight the unassailable finding that the advertisements are misleading.

The District Court made detailed factual findings, which are binding on the Petitioners, since they were not contested on appeal. A review of these facts highlights that the decisions below were correct, and that no Writ should issue from this Court:

1. Since 1933, Rhode Island has statutorily prohibited the retail sale of alcoholic beverages by what the statute has historically referred to as "chain store organizations." (Pet. App. 31).
2. Wine & Spirits Retailers (W&SR) and all of the individual stores that are franchisees are Rhode Island entities, corporations, or individuals. (Pet. App. 31).
3. Prior to the denial of the Preliminary Injunction, W&SR and the stores were parties to a Franchise Agreement that contained the following provisions and had the following characteristics:
    - Each franchisee was given an exclusive franchise within a specified geographic area. The franchisees each had different corporate names that were significantly different in

most cases. All did business under the name "Douglas Wine and Spirits."

- Franchisees were required to carry certain products and prohibited from carrying other products by W&SR. Further, W&SR specified the vendors from whom the franchisees could purchase products and the layout of the stores.
- Franchisees were required to pay an annual franchise fee and to contribute to an advertising and promotion fund that was controlled by W&SR. W&SR could terminate the Franchise Agreements at any time due to a failure of the franchisee to comply with the terms of the Franchise Agreement.
- Franchisees displayed posters and other literature at their stores containing references to the Douglas website. On behalf of all of its franchisees, W&SR negotiated with liquor wholesalers for volume discounts, and every two weeks W&SR placed ads in the Providence Journal newspaper on behalf of all participating stores, and those ads listed the products for sale at all Douglas stores and the prices charged for those products. (Pet. App. 31-32).

4. The "Franchise Agreements" have been replaced by "Consulting Agreements." Despite the semantics, very little has changed. There are still exclusive territorial provisions and all stores continue to do business under the banner of "Douglas Wine and Spirits." The only difference is that each store has added a single word naming the town in which the store is located. (Pet. App. 32-33).
5. W&SR still negotiates prices with wholesalers on behalf of all Douglas stores. (Pet. App. 33).
6. W&SR issues "Marketing Bulletins" telling stores what to carry and what prices to charge.

These are much more than mere "suggestions", as Petitioners urged. (Pet. App. 33).

7. Products are priced by a computer system by W&SR. The managers at the individual stores can mark down individual products. W&SR still issues suggestions regarding dress codes for employees and how each store is to be configured. (Pet. App. 33).

8. Advertisements are still placed in the Providence Journal every two weeks, except now they bear the name of only one store. Each prominently displays the "Douglas Wine and Spirits" logo, in large, bold face type followed by the location of the store that purportedly placed the advertisement, which appears in much smaller type, far less likely to be noticed by the reader. (Pet. App. 33).

9. The advertisements are paid for by a company called Tri-State, an affiliate of DWS. (Pet. App. 33).

10. All other stores display exact copies of each ad and offer the same products for the same prices listed in the ad, and they still pay a fee to W&SR for its advice and services and W&SR retains its right to cancel the relationship. (Pet. App. 33-34).

11. Rarely, if ever, would any store fail to offer a product shown in an ad at the price specified in the ad. (Pet. App. 34).

12. Stores charge identical prices for the non-advertised products that were randomly surveyed by an investigator from the state. (Pet. App. 34).

These uncontested findings establish that these Petitioners have engaged in harmful conduct for many years. Such conduct is not protected by the First Amendment, and the Petition should be rejected.

IV. Similar Legislation Has Consistently Been Upheld Against Constitutional Attack.

As part of the legislative grant of authority to control the traffic in alcoholic beverages, the assurance that the commercial aspects of the industry are operated under the conditions of free and unrestricted competition are worthy and constitutionally permissible goals. Nor is this legislation unusual.

Numerous states have historic limits on chain store operations in the liquor industry. In Massachusetts, factors considered under a previous statutory scheme in determining whether a chain store relationship existed were, among other things, single group insurance policies covering employees of all corporations; sharing common bookkeeping offices; substantial intercompany dealings; and who the employees are hired by and work for. *See Cleary v. Cardullo's, Inc.*, 198 N.E.2d 281 (Mass. 1964). That statutory limit of three stores was upheld against an equal protection attack in *Johnson v. Martignetti,* 375 N.E.2d 290 (Mass. 1978). That Court correctly found that the regulatory scheme was aimed at the business relationships and their positive effect on commerce and competition:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.

Id. at 297 (citations omitted).

In *Parham v. Oklahoma Alcoholic Beverage Control Board*, 412 P.2d 142 (Okla. 1966), the Oklahoma Supreme Court upheld, against a dual constitutional attack[9] a rule

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[9] Unconstitutional delegation of powers and due process.

requiring wholesalers to maintain minimum inventories of certain of the most popular brands of alcoholic beverages. In beginning its analysis, that Court stated:

> At the outset we must recognize that the liquor industry because of the very nature of its product requires strict control and close supervision. As a result, the Legislature by virtue of the police power of the State possesses broad powers to regulate and supervise all phases of traffic in intoxicating liquors. It is a generally accepted concept that 'the power of a state to regulate and restrict the liquor traffic' is far broader than the power to regulate or restrict ordinary businesses, because of its effect on the health and welfare of the public.

412 P.2d at 147.

The rule requiring a fourteen-day inventory of the most popular brands was read as expressing an intent on the part of the Oklahoma legislature that, " . . . within the framework of strict regulation which the liquor industry by its nature requires, the commercial aspects of the industry shall be operated under the conditions of free and unrestricted competition." *Id.* at 148. The Court upheld the rule, because it was " . . . clear that under the voluntary franchise agreement adopted by the wholesalers the extensive competition heretofore existing between wholesalers selling the same brands of liquor would be destroyed." There was no doubt in that case that the rule was specifically designed "to combat the voluntary franchise system. However, we make no determination of the wisdom of a liquor franchise system, be it voluntary or involuntary. That is a matter for determination by the Legislature and the people of the State of Oklahoma." *Id.* at 149. The legislative purpose, as exists in the case *sub judice*, was unrestricted commercial competition.

In *Granite State Grocers Assoc. v. State Liquor Comm'n*, 289 A.2d 399 (N.H. 1972), a prohibition against any person holding more than two off-site beverage permits was held not to deprive owners of the chain stores of their equal protection rights, nor was it found to violate

the federal Commerce Clause. The prohibition in that case was similar to that here – with New Hampshire allowing a chain of two, instead of the absolute prohibition here. In examining that scheme, the New Hampshire Court wrote that "The obvious purpose of this well-rounded regulatory system is to supervise and to fractionalize the beverage industry. . . ." The Court noted that "at least twenty states similarly restrict the number of alcoholic beverage permits. Such statutes have been held constitutional as serving a public purpose in the two states where the question has been considered." *Id.* at 400 (citations omitted). The lament of the Petitioners is the same as that rejected in *Granite State*:

> Regulations against concentration in the alcoholic beverage business necessarily discriminate against chain stores. . . . Discrimination based on size is not unconstitutional so long as it serves a bona fide public purpose. . . . The legislative motives in enacting economic and trade regulations, particularly in the regulation of alcoholic beverages, may require less stringent scrutiny and justification than in other so-called personal-rights decisions.

Id.

The assurance of equitable basis for competition was held enough to immunize a statute against an equal protection challenge in *Reinfeld v. Schieffelin & Co.*, 466 A.2d 563 (N.J. 1983). The following rationale applies with equal force in this case:

> The ultimate goal sought to be attained by the statute in question, as in the entire scheme of liquor legislation, is the protection of the public through the promotion of temperance and elimination of the racketeer and bootlegger. In order to accomplish this purpose the statute seeks to achieve as far as necessary the independence of wholesalers from distillers. A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the supply at will. For the purpose of strengthening the wholesaler's resistance

> if confronted with a distiller's wish to overstimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, *e.g.*, tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler.

Id. at 567. The same is true here – the fortunes of the franchisees' are inextricably intertwined with that of the W&SR who controls the day-to-day operations of each store. "However inconvenient the statute might be to [the franchisor's] and [the franchisees'] trade, even bona fide business policy in the field of liquor traffic must yield to the policy of the State." *Id.* at 568 (citation omitted). In rejecting an equal protection challenge, the New Jersey Court correctly recognized that "Liquor dealers are not a suspect class, nor is liquor distribution a fundamental right." In deciding that the statute was fundamentally and constitutionally sound, that Court decided that a legislature's "practically limitless" power to regulate the sale of intoxicating beverages accentuates the normal deference afforded by the "rational basis" test. Although that power was broad even before the passage of the Twenty-first Amendment, the latter has been read to give states plenary power to regulate the sale and distribution of liquor, and it permits classifications that relate to that regulatory function. The Court upheld the legislation as having a rational basis in the promotion of temperance, in that it would free from any illegitimate demands that suppliers might make those wholesalers who have become dependent on a supplier. That rationale is easily applied here.

In *Grand Union Company v. Sills*, 204 A.2d 853 (N.J. 1964), a similar law was upheld against due process and equal protection attacks even though the Court recognized that it would curb chain store liquor operations and aid small liquor dealers. Initially, that Court acknowledged that the

> legislation was entitled to the various presumptions of constitutionality which attend on judicial review of statutory enactments, and to aid from the doctrine that factual support for the legislative

> judgment would be presumed, and absent a sufficient showing to the contrary, the court would assume that the enactment rested upon some rational basis within the knowledge and experience of the Legislature.

As for the purpose found advanced by the statute: "They were designed to aid in the stabilization of the industry and in the promotion of temperance through the curbing of competitive practices which tended to stimulate sales." *Id.* This case is indistinguishable from those and the result should be the same.

A nearly identical attack was launched by these same Petitioners in *Peoples Super Liquor Stores v. Jenkins*, *supra*, and the same result obtained. As in this case the Petitioners presented "sparse" arguments, and their claims as to the First Amendment and Takings claims were rejected on Motion to Dismiss. The only claim that survived that initial disposition was the Commerce Clause claim, and the litigation was terminated before a decision could be reached.

The cases relied upon by the Petitioners to establish discord in the Circuits simply do not. They all involved cases of uncontroverted protected speech, which is not implicated here. None of those decisions involves action by the State to regulated anticompetitive, collusive conduct as is present here. Since they are not "tantamount to antitrust" cases, they should not be considered at all relevant.

CONCLUSION

The State's job is to legislate and regulate. In the area of alcoholic beverages, the State has wide latitude in determining how to structure the liquor distribution system. This statute is no more than one designed to ensure that consumers have choices, and its purpose was to end price-fixing. The evidence adduced at trial showed that Petitioners actions removed choice as to price and product by directing all aspects of the business from one central location, to the detriment of consumers. If every

store, every product, and every price is the same – consumer choice is negatively affected. The reach of the statute is only as far as need be.

The decision of the First Circuit is not in conflict with that of any other Circuit, or with any decision of this Court. To the contrary, it is merely the latest in a line of decisions upholding similar chain store bans in the retail liquor industry. This Court should decline to issue a Writ of Certiorari in this matter.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS, DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS N. PROVIDENCE, INC., *Plaintiffs,* *v.* STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, *Defendants,* *and* UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND, *Defendant-Intervenor.*	Civil Action No. 04-418-T

FIRST AMENDED COMPLAINT

(Filed Dec. 22, 2005)

Nature Of The Action

1. Plaintiffs allege violations of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §8 of the Constitution of the United States.

2. Sections 3-5-11 and 3-5-11.1 of the Rhode Island General laws unconstitutionally restrict the rights of speech and association and deny the Plaintiffs of their right to Equal Protection of the laws by denying them fundamental rights in a discriminatory manner.

3. Additionally, §3-5-10 discriminates against interstate trade in violation of the Commerce Clause of the Constitution of the United States.

Jurisdiction

4. This Court has subject matter jurisdiction over this action under 28 U.S.C. §1331, because the matter in controversy arises under the Constitution and laws of the United States. Plaintiffs' right to judicial review of the actions complained of is secured by 42 U.S.C. §1983.

5. Venue in this Court is proper under 28 U.S.C. §1391 because the events giving rise to this claim have occurred, and will occur, within the District of Rhode Island.

The Parties

6. WINE & SPIRITS RETAILERS, INC. (W&S) is a corporation organized under the laws of Rhode Island. W&S was the franchisor of Douglas Wine and Spirits (DW&S) and People's Liquor Warehouse (People's). W&S

currently sells business advice and advertising services as a consultant to liquor stores.

7. JOHN HARONIAN is a resident of Rhode Island who provides business advice to liquor stores within the state of Rhode Island. His ability to continue to provide this advice is restricted by the amended liquor control law.

8. DOUGLAS WINE & SPIRITS – CUMBERLAND, INC. (DW&S – CUMBERLAND) is a corporation organized under the laws of Rhode Island. DW&S – CUMBERLAND operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – CUMBERLAND had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

9. DOUGLAS WINE & SPIRITS N. PROVIDENCE, INC. (DW&S – N.PROVIDENCE) is a corporation organized under the laws of Rhode Island. DW&S – N.PROVIDENCE operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – N.PROVIDENCE had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

10. DOUGLAS WINE & SPIRITS – CRANSTON, INC. (DW&S – CRANSTON) is a corporation organized under the laws of Rhode Island. DW&S – CRANSTON operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – CRANSTON had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

11. Defendant STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS is a governmental unit,

which promulgates laws and regulations which are binding upon the Plaintiffs. RHODE ISLAND has enacted the statutes at issue in this litigation.

12. Defendant JEFFREY J. GREER, is the Associate Director of the Department of Business Regulations (DBR). In his capacity as Associate Director of the Division of Business Regulation, Division of Commercial Licensing and Regulation, GREER is tasked with enforcing the unconstitutional statutes at issue in this litigation. GREER is being sued in his official capacity only.

13. UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND is an organization of liquor stores from Rhode Island and Massachusetts, which has intervened in this action as a defendant.

Facts Common to All Claims

14. The Plaintiffs seek to restore their franchise relationships.

15. The Plaintiffs seek to speak to their prospective customers through joint advertising and through the use of the name Douglas Wine & Spirits.

16. The Rhode Island General Assembly enacted Rhode Island General Laws §§ 3-5-10, 3-5-11 and 3-5-11.1.

17. Section 3-5-11 bans the ownership of multiple Class A liquor licenses by the same individual or corporation.

18. Section 3-5-11.1 bans the holders of Class A licenses from participating in franchises. Section 3-5-11.1 took effect on April 1, 2004.

19. DW&S – CUMBERLAND, DW&S – N.PROVIDENCE and DW&S – CRANSTON had franchise agreements with W&S. Those agreements have been nullified by §§3-5-11, as amended, and 3-5-11.1.

20. DW&S – CUMBERLAND, DW&S – N.PROVIDENCE and DW&S – CRANSTON currently seek to purchase business advice and marketing services from W&S. This relationship is threatened by §3-5-11, as amended.

21. The elements of §3-5-11 are not separable.

22. The elements of §3-5-11.1 are not separable.

COUNT I
First Amendment to the Constitution of the United States – Speech

23. Sections 3-5-11 and 3-5-11.1 prohibit the Plaintiffs from engaging in expression protected by the First Amendment to the Constitution of the United States.

COUNT II
First Amendment to the Constitution of the United States – Assembly

24. Sections 3-5-11 and 3-5-11.1 violate the Plaintiffs' rights secured by the First Amendment to the Constitution of the United States by prohibiting the Plaintiffs from forming an expressive association.

COUNT III
First Amendment to the Constitution of the United States – Unfettered Discretion

25. The enforcement mechanism of §3-5-11's prohibition of chain stores permits unfettered discretion by the DBR in permitting some Class A to engage in the prohibited activities while not permitting others.

26. This unfettered discretion in the permitting or prohibiting of the First Amendment activities described above renders §3-5-11 unconstitutional.

COUNT IV
Article I, §8 of the Constitution of the United States (Commerce Clause)

27. Section 3-5-10 requires the owners of Class A license to be residents of Rhode Island.

28. This restriction limits the ability of out of state individuals to do business within Rhode Island.

29. Section 3-5-10 discriminates against interstate commerce and therefore violates the Commerce Clause.

30. Section 3-5-11 prohibits owner of liquor stores in other states from obtaining a Class A license in Rhode Island. Section 3-5-11 thereby discriminates against interstate commerce in violation of the Commerce Clause

COUNT V
Fifth Amendment to the Constitution of the United States

31. Sections 3-5-11 and 3-5-11.1 eliminates the reasonable investment backed property rights of the Plaintiffs in

their businesses and the value of their existing contractual relationships.

32. The unconstitutional taking of the Plaintiffs' property has caused damage to them in an amount to be proven at trial.

COUNT VI
Fourteenth Amendment to the Constitution Laws of the United States

33. Sections 3-5-11 and 3-5-11.1 deny fundamental rights to the Plaintiffs.

34. Sections 3-5-11 and 3-5-11.1 treat the Plaintiffs differently from similarly situated other individuals and businesses.

COUNT VII
Deprivation of Rights Secured by the Constitution and Laws of the United States in Violation of 42 U.S.C. §1983

35. Sections 3-5-10, 3-5-11 and 3-5-11.1 deprive the Plaintiffs of rights or privileges secured by the Constitution and laws of the United States.

36. This deprivation of rights has and will occur under color of law.

WHEREFORE, Plaintiffs respectfully request the following relief:

A. Enter judgment declaring §§3-5-11 and 3-5-11.1 violate the First Amendment to the Constitution of the United States; and

B. Enter judgment declaring §§3-5-10 and 3-5-11 violate Article I, §8 of the Constitution of the United States; and

C. Enter judgment declaring §§3-5-11 and 3-5-11.1 violate the Fifth Amendment to the Constitution of the United States; and

D. Enter judgment declaring §3-5-11 and 3-5-11.1 violate the Fourteenth Amendment to the Constitution of the United States; and

E. Enter judgment declaring that §§3-5-10, 3-5-11 and 3-5-11.1 have deprived the Plaintiffs of rights secured by the Constitution and laws on the United States in violation of 42 U.S.C. § 1983; and

F. Enter judgment declaring that §3-5-11(b)(1)(ii) violates 29 U.S.C. §1001; and

G. Permanently enjoin the defendants from enforcing §§3-5-10, 3-5-11 and 3-5-11.1; and

H. Award to Plaintiffs the costs of this action, including attorney fees as provided for by 42 U.S.C. §1988 and 29 U.S.C. §1132(g)(1); and

I. Award such other relief as the Court may deem just.

Dated: December 21, 2005

Respectfully submitted,

WINE & SPIRITS RETAILERS, INC., *et al.*

By their Attorneys,

/s/ Michael Williams
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WINE & SPIRITS RETAILERS, INC., *et al.* *Plaintiffs,* *v.* STATE OF RHODE ISLAND *et al.*, *Defendants.*	Civil Action No. 04-418-T

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiffs hereby certifies that true copies of the *Amended Complaint* were served upon the following attorneys of record by United

States first class mail, postage prepaid on this 21st day of December, 2005:

Rebecca Partington
Deputy Chief– Civil Division
Office of the Attorney General
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/s/ Michael Williams
Michael Williams (*pro hac vice*)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS DEPARTMENT OF BUSINESS REGULATION 233 RICHMOND STREET PROVIDENCE, RI 02903

IN THE MATTER OF:	:	
People's Liquor Warehouse-Hopkinton, Inc. d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-007**
RESPONDENT.	:	

IN THE MATTER OF:	:	
People's Liquor Warehouse-Apponaug, Inc. d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-008**
RESPONDENT.	:	

IN THE MATTER OF:	:	
People's Liquor Warehouse of Cranston LLC d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-009**
RESPONDENT.	:	

IN THE MATTER OF: **MAB Liquors, Ltd. d/b/a Douglas Wine & Spirits-Cranston,** **RESPONDENT.**	**DBR No. 06-L-010**

IN THE MATTER OF: **Delta Wine & Spirits, Inc. d/b/a Douglas Wine & Spirits-Smith St.** **RESPONDENT.**	**DBR No. 06-L-011**

IN THE MATTER OF: **Douglas Liquors, Inc. d/b/a Douglas Wine & Spirits-No. Providence, Inc.,** **RESPONDENT.**	**DBR No. 06-L-012**

IN THE MATTER OF: **Liquor Depot East Providence, Inc. d/b/a Douglas Wine & Spirits-East Providence, Inc.,** **RESPONDENT.**	**DBR No. 06-L-013**

IN THE MATTER OF: **No. Smithfield Wine & Spirits, Inc. d/b/a Douglas Wine & Spirits-North Smithfield, Inc.,** **RESPONDENT.**	**DBR No. 06-L-014**

IN THE MATTER OF: **CSW Operating Company d/b/a Douglas Wine & Spirits-Cumberland,** **RESPONDENT.**	**DBR No. 06-L-015**

IN THE MATTER OF: **Putnam Pike Liquors, Inc. d/b/a Douglas Wine & Spirits-44,** **RESPONDENT.**	**DBR No. 06-L-016**

IN THE MATTER OF: **Knights Wine & Spirits Inc. d/b/a Douglas Wine & Spirits-Johnston, Inc.,** **RESPONDENT.**	**DBR No. 06-L-017**

DECISION

I. INTRODUCTION

In 2004, the Rhode Island General Assembly amended R.I. Gen. Laws § 3-5-11 and enacted R.I. Gen. Laws § 3-5-11.1. R.I. Gen. Laws § 3-5-11.1, effective on April 1, 2005, prohibited the Department of Business Regulation ("Department") from granting, issuing, renewing, and/or transferring Class A liquor licenses[1] to or for the use of any liquor franchisor or franchisee. R.I. Gen. Laws § 3-5-11(a), also effective on April 1, 2005, prohibited the Department from granting, issuing, or transferring Class A liquor licenses to or for the use of any "chain store organization." R.I. Gen. Laws § 3-5-11(b)(1)(vi) defines "chain store organization" as:

> [a]ny group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly or have any direct or indirect beneficial interest in the following practices:
>
> . . .
>
> (vi) [a]ny term or name identified as a chain or common entity.

On January 6, 2006 the Director of the Department issued separate Orders to Show Cause, Notice of Hearing, and Appointment of Hearing Officer ("Order to Show Cause" attached as Exhibit 1) to each of the above-captioned Respondents for operating as a "chain store

[1] All of the Respondents in this matter are Class A liquor licensees pursuant to R.I. Gen. Laws § 3-7-3.

organization" in violation of R.I. Gen. Laws § 3-5-11 due to the use of a "same or materially similar name as another Class A licensee" (see Order to Show Cause, paragraph 5) as defined in R.I. Gen. Laws § 3-5-11(b)(1)(vi). The Orders to Show Cause allege that the above-captioned Respondents failed to comply with two (2) Departmental Bulletins dated September 21, 2005 (attached as Exhibit 2) and December 15, 2005 (attached as Exhibit 3) issued to all Class A liquor licensees explaining and informing the affected licensees regarding the prohibition of Class A licensees from using the same or materially similar names. Paragraph 4 of the September 21, 2005 Bulletin directed all of the Respondents to submit and obtain approval for a name dissimilar than other Class A licensees by December 31, 2005 in order to comply with R.I. Gen. Laws § 3-5-11(b)(1)(vi). The Department alleges in its Orders to Show Cause that Respondents have violated a directive of the Department and are engaged in a business practice prohibited by R.I. Gen. Laws § 3-5-11 and therefore, requests that pursuant to R.I. Gen. Laws § 3-5-11(b)(4) Respondents' licenses be revoked, or alternatively, the licensees be ordered to cease and desist from the prohibited practices and that a fine be imposed for the violation.

A pre-hearing conference on the Orders to Show Cause was held on February 16, 2006. At that time, counsel for the Department and the Respondents agreed to consolidate the above-captioned matters. On March 20, 2006, the Department filed a Motion and Memorandum of Law in Support of its Motion for Summary Judgment. On April 28, 2006, the Respondents filed their Memorandum in Support of their Opposition to the Department's Motion for Summary Judgment and their Cross-Motion for Summary

Judgment. On May 10, 2006, the Respondents submitted a supplemental letter and case in support of their Objection and Cross-Motion for Summary Judgment. On May 18, 2006, a status conference was held to determine whether the Department wanted to reply to Respondents' Objection and Cross-Motion for Summary Judgment. The Department did not reply in writing to Respondents' Objection and Cross-Motion for Summary Judgment and the parties requested that a Decision on the pleadings be issued.

It should also be noted that the undersigned Hearing Officer is also adjudicating another matter involving the same Respondents in a consolidated matter, DBR Numbers 05-L-0225 through to and including 05-L-0232, which addresses whether or not the Respondents are violating the other prohibited activities in R.I. Gen. Laws § 3-5-11(b)(1) and (2) other than R.I. Gen. Laws § 3-5-11(b)(1)(vi) (the bar against any term or name identified as a chain or common entity).

Additionally, the Wine and Spirits Retailers Inc. and John Haronian (referred to collectively as "W&S") filed a civil action on September 28, 2004 in the United States District Court for the District of Rhode Island against the State of Rhode Island and the Department seeking to declare R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 unconstitutional and enjoin the enforcement of the statutes by the Department. *See Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island and Providence Plantations and Jeffrey J. Greer, in his capacity as Associate Director of the Rhode Island Department of Business Regulation,* 364 F. Supp. 2d 172, 175 (D. R.I. 2005). W&S is the franchisor with whom the Respondents in this matter have a franchisee agreement under the name Douglas Wine & Spirits. The United States District Court

for the District of Rhode Island denied W&S's motion for a preliminary injunction. *Id.* at 183. W&S appealed the federal District Court's denial of its motion for a preliminary injunction to the United States Court of Appeals for the First Circuit and on August 10, 2005, said court affirmed the District Court's denial of the motion for preliminary injunction. *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island and Providence Plantations and Jeffrey J. Greer, in his capacity as Associate Director of the Rhode Island Department of Business Regulation*, 418 F.3d 36, 2005 (1st Cir.).

II. JURISDICTION

The Department has jurisdiction over the Respondents as Class A liquor licensees pursuant to R.I. Gen. Laws §§ 3-5-1 *et seq.* and 3-7-1 *et seq.*

IV. [sic] ISSUE

The issue in this matter is whether Respondents' use of the term or names as stipulated constitutes prohibited operation as a "chain store organization" as defined in R.I. Gen. Laws § 3-5-11(b)(1)(vi). If it is deemed to be a violation, the Hearing Officer must then determine an appropriate remedy for the violation of R.I. Gen. Laws § 3-5-11 pursuant to R.I. Gen. Laws § 3-5-11(b)(4).

V. UNDISPUTED FACTS

The Department and Respondents agree that:

A. R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 were amended and enacted, respectively, in 2004, and were effective as of April 1, 2005.

B. On September 21, 2005 the Department issued Bulletin 2005-2 to all Class A Licensees and Wholesalers. This Bulletin clarified four (4) questions relating to the types of practices prohibited by the amendment and enactment of R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 and informed Class A licensees that the statutory changes eliminate any chain store and alcoholic beverage franchisor/franchisee relationships. The Bulletin specifically stated that it was "not meant to be an exhaustive list of prohibited practices as set forth in the law, but rather will serve to provide an overview of certain prohibited practices for which enforcement action will be taken."

C. Bulletin 2005-2 stated that the following practice is prohibited:

> [E]xistence of Class A licensees with the same or materially same names. By April 1, 2006, each retail licensee will be required to operate under a name totally dissimilar from other Class A licensees with the exception that a full proper legal name may be used as a business name. For example, if there is more than one licensee operating under the name "Smith's Liquors" the same name should be changed to a totally dissimilar name or, if the owner is named Smith, the name may be changed to the full Legal name of the owner such as "Joe Smith's Liquors," to demonstrate appropriate differentiation. Accordingly, two (2) or more stores currently named in a manner such as "Hank's Liquors of Smithfield" and "Hank's Liquors of Newport" will not be considered a sufficient differentiation of name . . . The Department encourages all licensees to call with any further questions they may have about operating under R.I. Gen. Laws § 3-5-11 and 11.1.

D. From October 25, 2005 to October 31, 2005, the Respondents proceeded to change their "full proper legal name" with the Secretary of State's office:

1. from PLW-Hopkinton, Inc. to Peoples Liquor Warehouse-Hopkinton, Inc.

2. from Douglas Wine & Spirits Apponaug, Inc. to Peoples Liquor Warehouse-Apponaug, Inc.

3. from PLW Cranston, LLC to Peoples Liquors Warehosue [sic?] of Cranston, Inc.

4. from MAB Liquors, Ltd. To Douglas Wine & Spirits-Cranston, Inc.

5. from Delta Wine & Spirits, Inc. to Douglas Wine & Spirits-Smith Street, Inc.

6. from Douglas Liquors, Inc. to Douglas Wine & Spirits No. Providence, Inc.

7. from Liquor Depot East Providence, Inc. to Douglas Wine & Spirits-East Providence, Inc.

8. from No. Smithfield Wine & Spirits, Inc. to Douglas Wine & Spirits- No. Smithfield, Inc.

9. from CWS Operating Company to Douglas Wine & Spirits-Cumberland, Inc.

10. from Putnam Pike Liquors, Inc. to Douglas Wine & Spirits-44 Inc.

11. from Knights Wine and Spirits, Inc. to Douglas Wine and Spirits Johnston, Inc.

E. On November 17, 2005 the Respondents provided the Department with their name change Certificates issued by the office of the Rhode Island Secretary of State.

F. On December 15, 2005, the Department amended paragraph 4 of Bulletin 2005-2 to clarify additional criteria that do not deem a name "distinguishable" from another name. In that clarification, the Department stated that one of the criteria that would not be considered to distinguish the use of similar names is the addition of a geographic location or place, or a numeric designation (for example, Gourmet Liquors Inc. versus Gourmet Liquors of Providence, Inc. or Gourmet Liquors I, Inc. versus Gourmet Liquors II, Inc.).

G. On December 28, 2005 the Respondents resubmitted their same name changes as described in paragraph V (D) above to the Department.

H. On December 29, 2005, the Department rejected the Respondents' names.

VI. DISCUSSION

A. Summary Judgment Standard

Under Rule 56 of the Superior Court Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, it is necessary to view the evidence in the light most favorable to the nonmoving party. *Hefline v. Koszela,* 774 A.2d 25, 29 (R.I. 2001). Summary judgment is appropriate if there are no genuine issues of material fact remaining and the moving party is

entitled to judgment as a matter of law. *See Id.* The moving party bears the initial burden of demonstrating the absence of questions of material fact. *See Id.* That burden *may be satisfied by "submitting evidentiary materials*, such as interrogatory answers, deposition, testimony, admissions, or other specific documents, and/or pointing to the absence of such items in the evidence adduced by the parties." *Id.* (quoting *Doe v. Gelineau,* 732 A.2d 43, 48 (R.I. 1999)). In this matter, the parties have stipulated to the facts and it is clear that there are no material facts in dispute regarding the names submitted by the Respondents.

B. Department's Motion for Summary Judgment

The Department asserts that the clear and unambiguous language of R.I. Gen. Laws § 3-5-11(b)(I)(vi) prohibits the Respondents from using any term or name identified as a chain or common entity. The Department further asserts that the names as currently being used by Respondents constitute names evidencing a chain or common entity. The Department states that well-established principles of administrative law require that the Department be afforded deference in its administration and enforcement of the statute at issue. The Department further asserts that its guidelines regarding the use of names are reasonable and intended to enforce the statutory mandates in R.I. Gen. Laws § 3-5-11(b)(1)(vi) and because Respondents are clearly in violation of the Department's guidelines as articulated in Bulletin 2005-2 and its amendment, the Respondents' licenses should be revoked or alternatively, a cease and desist order shall be issued to the Respondents to prevent them from using

materially similar names as well as a fine not to exceed $10,000 per licensee pursuant to R.I. Gen. Laws § 3-5-I1(b)(4).

C. Respondents' Objection and Cross-Motion for Summary Judgment

The Respondents assert that the Department's interpretation and application of R.I. Gen. Laws § 3-5-11 should be quashed because: (i) the Department has abused its discretion; (ii) the Department's interpretation and application violates the Respondents' First Amendment right to freedom of speech; (iii) there are less drastic means available to achieve compliance with the statute; and (iv) the Department's interpretation and application violates the Respondents' Fifth Amendment rights because it is an illegal taking. Additionally, Respondents claim that the entire statutory scheme that governs R.I. Gen. Laws § 3-5-11 violates the Commerce Clause because it impermissibly burdens interstate commerce and violates the Sherman Anti-Trust Act because it illegally restrains trade and, therefore, prevents competition, which harms consumers. Therefore, Respondents allege that any order against Respondents to cease and desist the use of the Respondents' names would violate the Respondents' rights.

Respondents stress that the reason the Department must not be afforded deference in its interpretation of the statute at issue is because the interpretation violates the Constitution and the statute itself is unconstitutional because it infringes upon the First Amendment rights of the Respondents. The Respondents state that the Department is compounding the constitutional issues by misinterpreting the statute and abusing its discretion and

authority in the enforcement of the statute. Respondents maintain that the statute does not articulate the harm associated with from the existence and/or perception of a chain store organization. However, Respondents assume for the purpose of argument that the only harm sought to be avoided is the *misimpression* that a licensee is a chain store or affiliated with another store, and offer other methodology for enforcing the statute. Furthermore, Respondents assert that because the Department would allow the use of the full, legal name of the individual owner associated with the name of the licensee, the Department is acting arbitrarily in its application. That is, under the current criteria, the Department would allow the use of Kathleen Haronian's Douglas Wine & Spirits-North Providence, Inc. but not Douglas Wine & Spirits-North Providence. The Respondents allege that there is no difference in the two names. Therefore, the Respondents allege the criteria used by the Department to enforce the statute are arbitrary.

Respondents raise constitutionality of the statutes at issue based on violations of Respondents' First Amendment right to freedom of speech, the Fifth Amendment, the Commerce Clause and the Sherman Anti-trust Act, and the Equal Protection Cause. This Decision will discuss legislative intent, statutory construction, and the mandates imposed upon this administrative agency (part of the Executive Branch of government) without infringing upon the determination of constitutionality of statutes which lies solely within the Judicial Branch of government and is well outside the purview of this administrative agency. Additionally, it does not serve judicial economy nor further the purpose of administrative regulation – to enforce statutory mandates – to have an administrative agency

rule on the constitutionality of statutes which it is charged with enforcing. This is especially true in the context of this proceeding because the challenge to the constitutionality of the statutes at issue commenced in Federal District Court prior to this adjudication and is currently pending in federal District Court (and is scheduled to go to trial in June 2006). The Rhode Island Supreme Court has stated that:

> [t]he principle that protects an administrative agency from constitutional challenges during the course of a licensing or permit proceeding is based upon the necessity to establish and maintain orderly procedures required for effective implementation of administrative determinations pursuant to § 42-35-15, that review is circumscribed and limited to determinations that the agency itself might properly entertain and consider.

See Easton's Point Association et al. v. Coastal Resources Management Council et al., 522 A.2d 199, 202 (R.I. 1987).

D. Statutory Construction/Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining the statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey,* 688 A.2d 1289 (R.I. 1997). The Rhode Island Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (citing *Cocchini v.*

City of Providence, 479 A.2d 108, 111 (R.I. 1984); *Beaudoin v. Petit* 409 A.2d 536, 540 (1979); *Raymond Construction Co. v. Bisbano,* 326 A.2d 858, 861 (1974)). In cases where statutory language is ambiguous, the Rhode Island Supreme Court has consistently held that legislative intent must be considered. *Providence Journal Co. v. Rodgers,* 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.* It is also necessary to take into account the scope of the statute and the purpose sought to be accomplished through the enactment of the statute when determining how it is to be construed. *New England Die Co., Inc. v. General Products Co., Inc.,* 168 A.2d 150 (R.I. 1961).

In examining Title 3 of the Rhode Island General Laws, entitled Alcoholic Beverages, it is clear that the legislature intended to regulate many facets of the liquor industry. The chapters of Title 3 of the Rhode Island General Laws include such areas as: Chapter 4-Transportation of Beverages: Chapter 5-Licenses (including state and local licensing provisions, limitations on the number of licenses, manufacturer and wholesaler licenses); Chapter 6-Manufacturing and Wholesale Licenses; Chapter 7-Retail Licenses; Chapter 8- Regulation of Sales; Chapter 9-Adulterated Liquors; Chapter 10-Taxation of Beverages; Chapters 11 and 12-Penalties and Liabilities and Enforcement of Title; Chapter 13-Malt Beverage Supplier-Wholesaler Agreements; and Chapter 14- The Rhode Island Liquor Liability Act. This comprehensive statutory scheme clearly reflects the legislative intent to control, regulate, penalize, and monitor activities related to liquor. Additionally, R.I. Gen. Laws § 3-1-5

states that "[t]his title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-2-2 also gives the Department "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and *selling beverages*." (Emphasis added). This authority supervision ties into the Department's regulation in R.I. Gen. Laws § 3-5-1 *et seq.*, entitled Licenses Generally, because the licenses are required for manufacture, sale or importation of beverages (R.I. Gen. Laws § 3-5-1).

The purpose and scope of the statute at issue, R.I. Gen. Laws § 3-5-11(b)(1)(vi) and R.I. Gen. Laws § 3-5-11.1 (prohibiting liquor franchises) must, therefore, be analyzed in the context of this statutory scheme. R.I. Gen. Laws § 3-5-11.1 states that the purpose of the liquor franchise prohibition is to "promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." The statutory definition of "chain store organization," and its criteria in R.I. Gen. Laws § 3-5-11(b)(1)(vi) is clear, unambiguous criteria established by the legislature requiring the Department to regulate the sale of liquor by certain licensees in a certain manner-by limiting the term or name identified as a chain or common entity.

The Rhode Island Supreme Court has consistently upheld the Department's authority to regulate the liquor industry. It has long been established that the role of the Liquor Control Administrator (subsequently replaced by the Department) in Rhode Island is that of a "superlicensing board" with a broad and comprehensive power of

review. *Hallene v. Smith,* 201 A.2d 921, 924 (R.I. 1964) (de novo review necessary to fulfill intention of Legislature to "provide broad and comprehensive control by the State over the liquor traffic and to vest that control in an administrative body"); *Tedford et al v. Reynolds,* 141 A.2d 264, 267 (R.I. 1958); *Baginski v. Alcoholic Beverage Commission,* 4 A. 2d 265, 268 (R.I. 1939); *see Clark v. Alcoholic Beverage Commission,* 170 A. 79, 80 (R.I. 1934). This authority derives in part from the general supervisory authority in matters related to liquor licensing that is vested in the Department through R.I. Gen. Laws § 3-2-2, which states that "the department has general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." Further evidencing the wide powers of supervision and regulation vested in the Department and the scope of Department's authority is R.I. Gen. Laws § 3-1-5 which provides: "this title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." See *Thompson v. Town of East Greenwich,* 512 A.2d 837, 842 (R.I. 1986). The seminal cases in the area of describing the purpose, scope and necessity of liquor regulation by the Department are *Baginski, Clark,* and *Standard Bottling Company v. Brewster,* 65 R.I. 279 (1940). These post-prohibition cases recognize the well-established need to address the pre-prohibition system of regulation which was an "unsupervised system of local regulation" and a "lack of uniformity" in administering the law, resulting in "grave abuses which, as a matter of common knowledge, seriously affected public welfare." *Baginski* at 181. The Rhode Island Supreme Court has stated that the legislature expressly

provided for state control and has adopted a system for administering such control in a manner which it deems the most likely to be productive of the public good. *Bd. of License Commissioners v. Daneker,* 78 R.I. 101, 107 (R.I. 1951). It should be noted that the Rhode Island Supreme Court has also recognized the Department's ability to review cases on its own initiative pursuant to R.I. Gen. Laws §§ 3-5-21 and 23.

The purpose of prohibitions set forth in R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 is to create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the evident purposes of Title 3 of the Rhode Island General Laws in its entirety and R.I. Gen. Laws §§ 3-1-5 and 3-5-11.1. Therefore, the Department is granted clear, unambiguous statutory mandates requiring it to determine whether Class A liquor licensees are operating as a "chain store organization" by using a term or name identified as a chain or common entity and determine an appropriate penalty for such prohibited activity.

E. Department's Interpretation and Application of Statute

The Department's interpretation of R.I. Gen. Laws § 3-5-11 is not an abuse of discretion and is not selectively applied to Respondents.[2] The Department's interpretation

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[2] The federal District Court stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al.,* at 174-175 that "[s]ince 1933, Rhode Island, like many other states, has statutorily prohibited the retail sale of alcoholic beverages by 'chain store organizations.' (*citing* R.I. Gen. Laws § 3-5-11 and referencing *see Granite*

(Continued on following page)

as reflected in Bulletin 2005-2 and its December 15, 2005 amendment clearly sets forth guidelines to allow entities and individuals to distinguish their names to minimize the use of a chain or common entity. The Department clearly stated in its September 21, 2005 Bulletin that the adding of a location to an existing similar name would not be considered a sufficient differentiation of name. However, in defiance of that mandate, the Respondents proceeded to change their names to make them *more* similar to one another by adding locations to the same names-Peoples Liquor Warehouse and Douglas Wine & Spirits. Then, in an act of further disingenuousness, they proceeded to assert that they thought paragraph 4 of Bulletin 2005-2 allowed the use of a "full proper legal name" even though the context of the example set forth in that paragraph was inconsistent with the Respondents' interpretation. The Department clearly intended to apply the "full proper legal name" standard to the name of an individual as opposed the name of a business entity. It is clear from the result of the Respondents' name changes (to make the names more similar) that it was an unreasonable interpretation by Respondents.

The criteria enunciated in the Department's Bulletins clearly sought to inform its licensees and assist them in the enforcement of the statutory mandate while recognizing that some of the licensees had a personal stake in their businesses. For that reason, it is reasonable that the Department allowed the "full proper legal name" of individuals

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State Grocers Ass'n v. State Liquor Comm'n, 112 N.H. 62, 289 A.2d 399, 402 (N.H. 1972) (observing that at least twenty states, plus New Hampshire, restrict the number of alcoholic beverage permits that may be held by a single person or group.)

to be attached to the name of the licensee. Furthermore, the use of individual names clearly ties the license to an individual separate and apart from a business entity which is consistent with the requirement in R.I. Gen. Laws § 3-5-1(b)(1)(vi). That is, a business entity name (without reference to an individual's full proper name) is more likely to be deemed a chain or common entity. The Respondents' current names clearly exemplify the exact rationale for requiring distinguishable names in order to prevent the misperception of a chain store or common entity. The names currently used by Respondents are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi).

F. Allegations Regarding Unconstitutionality of the Department's Interpretation/Application

Respondents assert that because the First Amendment protects Respondents' trade names as speech, the Department's attempt to revoke the Respondents' trade name infringes upon the Respondents' right to freedom of speech. Therefore, Respondents argue R.I. Gen. Laws § 3-5-11(b)(1)(vi) prohibits the Respondents' trade names in violation of the First Amendment. While it is clear that this administrative agency does not have the authority to adjudicate the constitutionality of statutes, it is compelled to address Respondents' constitutional claims because they have been raised as issues prohibiting the enforcement of R.I. Gen. Laws § 3-5-11(b)(1)(vi). Respondents assert that because their trade names convey more information to the potential consumer than the source of the products sold, the restriction on the trade name constitute an infringement on *pure* speech which should be afforded higher

standard of scrutiny than an infringement on commercial speech. Respondents assert that their trade names convey reputation for quality, price and service associated with the name "Douglas Wine & Spirits" and "Peoples Liquor Warehouse;" therefore, the infringement is upon pure speech. The alleged conveyance of quality, price, and service through the trade names at issue are impossible to meaningfully establish in this context.

Assuming *arguendo* that the statute is subject to the analysis articulated in *Central Hudson Gas & Electric Corp v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), it is clear that under the analysis set forth in Section V (D) above, the statute and the Department's application of the statute meet the *Central Hudson* Test:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. As stated in Sections V (D), the prohibition of franchises is lawful activity and clearly not misleading, and the governmental interest in the regulation of alcoholic beverages generally, and Class A licensees specifically is statutorily mandated and supported by well-established caselaw. Therefore, it clearly advances governmental interests and the restrictions on chain store

organizations as applied by the Department is clearly intended to advance the goals to create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the evident purposes of Title 3 of the Rhode Island General Laws in its entirety and R.I. Gen. Laws §§ 3-1-5 and 3-5-11.1 specifically. The restriction on the use of similar names clearly furthers the statutory purpose of prohibiting chain store organizations. The names as used by Respondents clearly convey a chain or common entity which is expressly prohibited by R.I. Gen. Laws §§ 3-5-11(b)(1)(vi) and 3-5-11.1.

The undersigned also rejects Respondents assertion that the Department's interpretation of R.I. Gen. Laws § 3-5-11 and rejection of the Respondents' trade names must fail because less dramatic means are available. Respondents suggest that the Department allow the phrase "independently owned and operated" to follow Respondents' names on their signs. The Department has rejected this additional phrase because it still conveys the connection or affiliation of entities. Alternatively, Respondents suggest that they be afforded the opportunity to add the phrase that reads "Not a chain store." It is clear that allowing Respondents to have similar names with qualifying phrases does not fully distinguish the entities in a meaningful way. Furthermore, even if entities are designated to be "independently owned and operated" and/or "not a chain store," the presence of any similar term or name identified as a chain or common entity among entities sends mixed messages to the consumer and is not a reasonable application of that prohibition.

Finally, Respondents assert that R.I. Gen. Laws § 3-5-11(b)(1)(vi) violates the Commerce Clause, the Sherman

Anti-Trust Act, and the Equal Protection Clause. For the reasons stated herein regarding the purpose of the statute within the context of the Department's authority to regulate such activity, it is well within the authority of this agency to interpret and apply the statute as described in this matter. The Respondents have not set forth sufficient facts to sustain their allegations of violations of the Commerce Clause, the Sherman Anti-Trust Act and the Equal Protection Act. Specifically, it is not clear how requiring Respondents to change their name burdens interstate commerce and discriminates against out-of-state commerce because all licensees will be subject to the same criteria. With respect to the Sherman Anti-Trust Act allegations, it is not clear what empirical evidence is being used to support Respondents' conclusions. The Equal Protection Clause violations also are not supported by the facts in this matter. It is clear that the statutory prohibition of a term or name identified as a chain or common entity serves a legitimate governmental interest as decided by the General Assembly in prohibiting chain store organizations as set forth herein.

G. Administrative Penalty

Respondents have been afforded ample opportunity to comply with the statutory mandates of R.I. Gen. Laws § 3-11-5(b)(1)(vi) and have deliberately chosen, not only to refuse to comply, but have taken the additional measure of using names that are more indicative of a chain or common entity than prior to the issuance of the Department's Bulletins. It is reasonable to allow licensees the benefit of due process to challenge statutory mandates within the paradigm of the administrative process; but Respondents' actions in this matter clearly evidence not a reasonable

availing of the administrative process, but a desire to intentionally violate a clear statutory mandate. It is one thing for the licensees to continue to operate under their former licensed names, but in this matter, Respondents proceeded to change their names to reflect a more compelling example of a chain or common entity. Their explanations regarding using "full proper legal name" ignores the context of the Bulletin and does not demonstrate a good-faith effort to undertake an administrative adjudication to seek relief from statutory mandates but to calculatingly flout the mandate by more egregiously violating it while feigning attempted compliance. Respondents' actions in this matter do not demonstrate the requisite "suitability" qualification required of licensees pursuant to R.I. Gen. Laws § 3-5-10.

It is also troubling that the federal District Court's April 8, 2005 decision in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 seemingly confirms that Respondents are currently franchisees in violation of R.I. Gen. Laws §§ 3-5-11 and 11.1:

> [a]pproximately seven years ago, W&S, which itself does not hold a Class A license, began enlisting independently-owned liquor stores to operate as its franchisees under the name Douglas Wine & Spirits. The terms of the franchise arrangement are set forth in the Uniform Franchise Offering Circular filed by Wine & Spirits with the Department of Business Regulation and in W&S's standard franchise agreement. Those terms include provisions that authorize W&S to designate geographical territory in which the franchisee may operate; the inventory items that the franchisee is allowed or required to carry; the vendors from which the franchisee may purchase

> those items; and the layout of the franchisee's store. The franchisee is required to pay an annual franchise fee and to contribute to an advertising and promotion fund controlled by W&S. In exchange, W&S agrees to grant the franchisee exclusive franchise rights within the assigned territory; to help the franchisee train its employees; and to advise the franchisee with respect to advertising, marketing, and other aspects of the franchisees business.

The undersigned Hearing Officer takes notice pursuant to Rule 201 of the Rhode Island Rules of Evidence of the facts stated in April 8, 2005 decision of the federal District Court and is compelled to address the violation as described above. If the Respondents are a party to a franchise agreement, said agreements are declared null and void and illegal as of the effective date of R.I. Gen. Laws § 3-5-11.1, April 1, 2005, and shall be terminated by the franchisor or the franchisee within thirty (30) days of the effective date of this section pursuant to R.I. Gen. Laws § 3-5-11.1(c). Furthermore, upon finding of a violation of R.I. Gen. Laws § 3-5-11.1 by either the franchisor or the licensee, the Department is empowered to set a fine up to the amount of ten thousand dollars ($10,000) per violating franchisor or licensee, revoke the license of the violator or suspend the license of the violator for a period of time to be determined by the Department pursuant to R.I. Gen. Laws § 3-5-11.1(d). R.I. Gen. Laws § 3-5-11.1(d) also gives the Department the power to revoke or suspend the franchise registration in accordance with R.I. Gen. Laws 19-28.1-18 and to order it to cease and desist from all operations that are violative of the provisions of this section. The undersigned would be remiss if she did not address the facts stated in the federal District Court

decision regarding the apparent violation of R.I. Gen. Laws § 3-5-11.1. Therefore, since a violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi) has already been determined, it is necessary within the context of this proceeding to inquire further about the apparent violations of R.I. Gen. Laws § 3-5-11.1 in order to craft an effective, meaningful remedy. Additionally, regardless of whether the franchise agreements are still in place, the dissolution of the violating chain store entities pursuant to R.I. Gen. Laws § 3-5-11(b)(4) is a remedy that is provided to the Department and effectively cures the violation, better serves the interests of the Respondents (rather than the revocation of the license as requested by the Department) and enforcement of these specific statutory mandates. Furthermore, it is clear from the language of R.I. Gen. Laws § 3-5-11(b)(1) that only one practice of the six (6) listed have to [sic] established in order to adjudicate an entity a "chain store organization." Therefore, it is the undersigned's recommendation that because R.I. Gen. Laws § 3-5-11(b)(4) authorizes the Department to "order the dissolution of the violating chain store entity(s)," it is appropriate to order such dissolution in order to effectuate the statutory mandate of prohibiting chain store organizations, and franchises. For these reasons, the undersigned Hearing Officer recommends that Respondents be ordered to:

1. Pay an administrative penalty of $5,000 per Respondent;

2. Suspend their licenses for a period of ten (10) business days;

3. During the ten (10) day suspension, Respondents shall seek the approval of name change from the Department and cease and desist from conducting any licensed activity

until such time that the Department approves the use of a name for each Respondent.

4. Confirm within ten (10) business days of this Decision whether the facts stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 regarding existing franchise agreements are still true. If said facts are true, and the Respondents are parties to franchise agreements, said franchise agreements are deemed null and void and illegal pursuant to R.I. Gen. Laws § 3-5-11.1(b) and the undersigned further orders the dissolution of the violating Respondents as chain store entities pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) and 3-5-11.1(d).

5. Appear before the undersigned on June 29, 2006 at 10:00 am for a status conference related to the status of Respondents' compliance with the terms of this Decision and the process to be utilized to dissolve the chain store entities.

6. The Department may move for additional remedies if the facts pertaining to the status of Respondents' franchise agreements so warrant. Respondents shall be afforded notice and an opportunity to object to said remedies.

VII. FINDINGS OF FACT

A. The undisputed facts as stated in Section V of this Decision are incorporated by reference as findings of fact herein.

B. The undersigned Hearing Officer takes administrative notice of the fact that Respondents may be a party to a franchise agreement based on the decision of the federal District Court in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175.

VIII. CONCLUSIONS OF LAW

A. Respondents' use of their names as proposed to the Department and described in Section V herein constitutes the use of terms or names identified as a chain or common entity and therefore establish a "chain store organization" under R.I. Gen. Laws § 3-5-11(b)(1)(vi).

B. Respondents' use of their names as proposed to the Department and described in Section V herein is a violation of R.I. Gen. Laws § 3-5-11(a).

C. The undersigned Hearing Officer takes quasi-judicial notice of *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 pursuant to Rule 201 of the Rhode Island Rules of Evidence.

D. The existence of franchise agreements as described in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 may, if still in existence, constitute a violation of R.I. Gen. Laws § 3-5-11.1.

E. Respondents' violations of R.I. Gen. Laws § 3-5-11 warrant the imposition of administrative penalties pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) including suspension, a cease and desist order, an administrative penalty, and the dissolution of the chain store organizations.

F. The existence of franchise agreements in which Respondents are parties may constitute a violation of R.I. Gen. Laws § 3-5-11.1 and warrant further inquiry by this Hearing Officer in order to craft an effective, meaningful remedy pursuant to R.I. Gen. Laws § 3-5-11(b)(4) and 3-5-11.1(d).

G. The dissolution of the chain store entities pursuant to R.I. Gen. Laws § 3-5-11(b)(4) is a more effective remedy for the violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi) than the revocation of licenses sought by the Department.

H. As part of the Department's remedy to dissolve the chain store entities, it is necessary to give the opportunity to be heard to aid in the effective dissolution of the chain store entities.

IX. RECOMMENDATION

For the reasons stated herein, the undersigned Hearing Officer respectfully recommends that the Department's Motion for Summary Judgment be granted and the Respondents' Cross-Motion for Summary Judgment be denied. The undersigned Hearing Officer also recommends that the Respondents be ordered to:

A. Pay an administrative penalty of $5,000 per Respondent;

B. Suspend their licenses for a period of ten (10) business days;

C. During the ten (10) business day suspension, Respondents shall seek the approval of name change from the Department and cease and desist from conducting any licensed activity until such time

that the Department approves the use of a name for each Respondent.

D. Confirm, in writing, to the Department within ten (10) business days of this Decision whether the facts stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 regarding existing franchise agreements are still true. If said facts are true, and the Respondents are parties to franchise agreements, said franchise agreements are deemed null and void and illegal pursuant to R.I. Gen. Laws § 3-5-11.1(b) and the undersigned further orders the dissolution of the violating Respondents as chain store entities pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) and 3-5-11.1(d).

E. Appear before the undersigned on June 29, 2006 at 10:00 am for a status conference related to the status of Respondents' compliance with the terms of this Decision and the process to be utilized to dissolve the chain store entities.

F. The Department may move for additional remedies if the facts pertaining to the status of Respondents' franchise agreements so warrant. Respondents shall be afforded notice and an opportunity to object to said remedies.

Dated May 24, 2006 /s/ Neena Sinha Savage
Neena Sinha Savage, Esq.
Hearing Officer

ORDER

I have read the Hearing Officer's Recommendation in this matter, and I hereby take the following action with regard to the Recommendation:

✓ ADOPT
___ REJECT
___ MODIFY

Dated: 5/24/2006

/s/ A. Michael Marques
A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 25th day of May, 2006, a copy of this Decision was sent by first class and certified mail, postage prepaid to

Robert J. Roughsedge, Esq.
Lawson & Weitzen, LLP
88 Black Falcon Avenue
Suite 345
Boston, MA 02210-1736

and by hand-delivery to:

Michael Jolin, Esq.
Deputy Chief of Legal Services
233 Richmond Street
Providence, RI 02903

/s/ A B Ellison

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

Filed May 21, 2007

PROVIDENCE, SC.		**SUPERIOR COURT**
PEOPLES LIQUOR WAREHOUSE – HOPKINTON, INC., *et al.*	:	
v.	:	**CA. No. PC-2006-3223**
DEPARTMENT OF BUSINESS REGULATION	:	

DECISION

CLIFTON, J. The Appellants, eleven Rhode Island-based package stores holding Class A liquor licenses, appeal a Rhode Island Department of Business Regulation ("DBR") decision granting summary judgment in favor of the DBR. A DBR Hearing Officer determined that the Appellants' use of essentially the same business name violates G.L. 1956 § 3-5-11(b)(1)(vi), which prohibits licensees from using "[a]ny term or name identified as a chain or common entity." The Hearing Officer found that the Appellants' business names identified them as a chain or common entity in violation of G.L. 1956 § 3-5-11(a) and ordered the Appellants to pay an administrative penalty of $5,000 each and suspended their licenses for a period of ten (10) business days. The Hearing Officer further required Appellants to seek DBR approval of any business name changes and to cease and desist from conducting any licensed activity until the DBR approves the use of a name for each of them.

The Appellants appeal the DBR decision on four grounds. First, they assert that G.L. 1956 § 3-5-11, facially

and in the manner of its enforcement by the DBR, violates the Appellants' rights secured under the First Amendment of the United States Constitution. The Appellants also argue that federal trademark laws preempt the DBR's statutory authority to regulate trade names. Third, they contend that the DBR decision violates the dormant Commerce Clause in Article I, Section 8 of the United States Constitution. Finally, the Appellants claim that the DBR decision constitutes the taking of a vested, federally recognized property right protected by the Fifth Amendment of the United States Constitution.

The Appellants now seek to have this Court overturn the DBR Decision. This Court has jurisdiction over the instant appeal pursuant to G.L. 1956 § 42-35-15(g). For the reasons set forth below, this Court affirms the DBR Decision and denies the appeal.

FACTS AND TRAVEL

Each of the Appellants is a Class A liquor licenseholder engaging in the retail sale of alcoholic beverages pursuant to G.L. 1956 §§ 3-2-2 *et seq.*, 3-5-1 *et seq.*, and 3-7-1 *et seq.* Under §§ 3-7-1 and 3-7-3, "a retailer's Class A license authorizes the holder to keep for sale and to sell at the place described beverages at retail and to deliver the beverages in a sealed package or container, which package or container shall not be opened nor its contents consumed on the premises where sold." The DBR has jurisdiction to regulate and control the sale of alcoholic beverages in Rhode Island pursuant to §§ 3-2-2, 3-5-1 *et seq.*, and 3-7-1 *et seq.* and §§ 42-14-1 and 42-14-2. Pursuant to § 3-5-11, the DBR may determine whether any group of one or more

Class A liquor licensees constitutes a "chain store organization" following an evidentiary hearing.

During the DBR hearing, the Appellants and the DBR filed cross-motions for summary judgment on whether the Appellants' use of their business names violated the provisions of G.L. 1956 § 3-5-11(b)(1)(vi).[1] For summary judgment purposes, the DBR and the Appellants stipulated that three (3) of the Appellants conduct business under the name "People's Liquor Warehouse," and eight (8) operate under the business name "Douglas Wine & Spirits." All eleven of these Class A licensees append different geographic locations to their names – for example, "Peoples Liquor Warehouse – Hopkinton." The DBR argued that summary judgment was proper because the Appellants' use of the same business name – distinguished only by a reference to geographic location – violates § 3-5-11(b)(1)(vi).

In support of their cross-motion for summary judgment, Appellants argued that the DBR's interpretation and application of § 3-5-11(b)(1)(vi) should fail because: (i) the DBR abused its discretion in enforcing the statute; (ii) the DBR's interpretation and application of § 3-5-11(b)(1)(vi)

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[1] G.L. 1956 § 3-5-11(b) provides, in pertinent part, that:

The term "chain store organization" is defined to include, but not limited to:

> (1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices: . . .
>
> > (vi) Any term or name identified as a chain or common entity.

is an unconstitutional and arbitrary infringement upon protected commercial speech; and (iii) § 3-5-11 violates the Commerce Clause and the Sherman Anti-Trust Act.

In the DBR Decision, the DBR Hearing Officer discussed legislative intent, statutory construction, and the mandates that the General Assembly imposed on the DBR with respect to the regulation of alcoholic beverages. The Hearing Officer declined to rule on the Appellants' constitutional claims, because she recognized that an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue. *See Easton's Point Assoc. v. Coastal Resources Mgmt. Council,* 522 A.2d 199, 202 (R.I. 1987) (holding that administrative agencies are circumscribed from considering constitutional challenges during the course of a licensing or permit proceeding). She further explained that only the judicial branch can make such a determination. The Hearing Officer also noted that some of the Appellants had brought a constitutional challenge § 3-5-11 before the United States District Court for the District of Rhode Island. That case did not go to trial until approximately one month after the DBR released its decision in May, 2006.

According to the Hearing Officer, the General Assembly intended Title 3 of the Rhode Island General Laws (the Alcoholic Beverages statutes) to control, regulate, penalize, and monitor activities related to liquor. Section 3-2-2(a) of the Rhode island General Laws gives the DBR "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." Thus, the Hearing Officer determined that the prohibitions set forth in § 3-5-11 served to create uniformity and consistency in

the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the purposes of the Alcoholic Beverages statutes. *See* G.L. 1956 § 3-1-5 (stating that "purpose [of Title 3] is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages"). The Hearing Officer held that the DBR had clear, unambiguous statutory mandates to determine whether Class A liquor licensees were operating as a "chain store organization" when they used a term or name identified as a chain or common entity.

In her decision, the Hearing Officer also determined that the DBR's interpretation of § 3-5-11 did not constitute an abuse of the agency's discretion and that the DBR did not selectively apply the statute to the Appellants. She held that, in DBR Bulletin 2005-2 of September 21, 2005, the DBR provided clear guidelines to Class A licensees who had the same or similar business name as another Class A retailer. The Bulletin explicitly stated that the DBR would not consider adding a location to an existing similar name a sufficient differentiation of name to satisfy § 3-51-1. Additionally, the Hearing Officer determined that the Appellants had defied the DBR mandate by merely appending locations to "Peoples Liquor Warehouse" and "Douglas Wine & Spirits." The Hearing Officer concluded that the Appellants' current names exemplify the exact rationale for requiring distinguishable names in order to prevent the misperception of a chain store or common entity. Thus, the Hearing Officer found that the names currently used by the Appellants were not easily distinguishable, appeared to be a chain or common entity, and therefore clearly violated § 3-5-11(b)(1)(vi). Although the DBR sought to revoke the Appellants' licenses, the Hearing

Officer imposed administrative penalties pursuant to § 3-5-11(b)(4) that included a 10-day suspension, a cease and desist order, an administrative penalty of $5,000 for each licensee, and the dissolution of the chain store organization.

The Director of the DBR approved the Hearing Officer's recommended decision on May 24, 2006. On or about June 16, 2006, the Appellants filed a timely Complaint of Appeal pursuant to § 42-35-15. This Court granted a Motion for a Stay of the Order pending further review. On September 28, 2004, the franchisor, Wine & Spirits Retailers, Inc., filed suit in the United States District Court for the District of Rhode Island, alleging that §§ 3-5-11 and 3-5-11.1 violated the franchisor's constitutional rights pursuant to the First Amendment, the Commerce Clause contained in Article I, Section 8, the Takings Clause of the Fifth Amendment and the Fourteenth Amendment's guarantees of Equal Protection. The franchisor requested a preliminary injunction against enforcement of the amended provisions, which the District Court denied. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 364 F.Supp. 2d 172 (D.R.I. 2005) (*Wine & Spirits Retailers (I)*). The franchisor thereafter appealed the District Court's denial to the United States Court of Appeals for First Circuit, which upheld the District Court's decision. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 418 F.3d 36 (1st Cir. 2005) (*Wine & Spirits Retailers (II)*). Subsequently, the franchisor amended the complaint to add three new store plaintiffs: the Douglas Wine & Spirits stores in Cumberland, Cranston, and North Providence.

On July 10 and 11, 2006, the District Court held a bench trial on the franchisor and stores' federal complaint. The District Court decision rejected all constitutional

arguments pressed by the plaintiffs in that action. (*See* Transcript of the District Court Decision in *Wine & Spirits Retailers, Inc. v. Greer,* C.A. 04-418T, July 19, 2006) Subsequently, the First Circuit affirmed the District Court's decision and found that the General Assembly had acted in the public interest in enacting G.L. 1956 § 3-5-11 and did not cross any constitutional boundaries. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 481 F.3d 1 (1st Cir. 2007) (*Wine & Spirits Retailers (III)*).

STANDARD OF REVIEW

The Court reviews contested agency decisions pursuant to the provisions of the Rhode Island Administrative Procedures Act, G.L. 1956 § 42-35-15(g). Section 42-35-15(g) provides that:

> [t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on the questions of fact. The court may affirm a decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In access of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

(5) Clearly erroneous in light of reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing an agency decision, the Court will not weigh the evidence upon which findings of fact are based, but will limit itself to an examination of the certified record in deciding whether the agency had substantial evidence to support its decision. *Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros,* 710 A.2d 680, 684 (R.I. 1998). The Rhode Island Supreme Court has defined "substantial evidence" as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." *Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights,* 673 A.2d 457, 459 (R.I. 1996). Moreover, the Court will not substitute its judgment for that of an administrative agency as to the weight of the evidence on questions of fact, even if the Court "might be inclined to view the evidence differently and draw inferences different from those of the agency." *Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan,* 755 A.2d 799, 805 (R.I. 2000) (quoting *Rhode Island Pub. Telecomm. Auth. v. Rhode Island State Labor Relations Bd.,* 650 A.2d 479, 485 (R.I. 1994)). Therefore, the Court may reverse findings of fact only where an agency's factual conclusions are "totally devoid of competent evidentiary support in the record," *Baker v. Dep't of Employment and Training Bd. Of Review,* 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Res. Mgmt. Council,* 434 A.2d 266, 272 (R.I. 1981)). Although the Court may freely conduct de novo review of an

agency's determinations of law, *Arnold v. R.I. DOL & Training Bd. of Review,* 822 A.2d 164, 167 (R.I. 2003) (citing *Johnston Ambulatory Surgical Assocs.,* 755 A.2d at 805), "the law in Rhode Island is well settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." *In re Lallo,* 768 A.2d 921, 926 (R.I. 2001) (citing *In re Advisory Opinion to the Governor,* 732 A.2d 55, 76 (R.I. 1999); *Pawtucket Power Assocs. Ltd. Partnership v. City of Pawtucket,* 622 A.2d 452, 456 (R.I. 1993); *Defenders of Animals, Inc. v. Dept. of Envtl. Mgmt.,* 553 A.2d 541, 543 (R.I. 1989) (attributing great weight to an agency's construction of a regulatory statute when the provisions of the statute were unclear)).

ANALYSIS

I

The Weighing of Evidence by the Hearing Officer

The Appellants allege that that [sic] the Hearing Officer arbitrarily enforced G.L. 1956 § 3-5-11 and ask this Court to review the factual determinations of the Hearing Officer. Additionally, the Appellants assert that this Court should quash the DBR's interpretation and application of § 3-5-11 because the DBR abused its discretion and because the Hearing Officer should have used less drastic means to achieve compliance with the statute. Furthermore, the Appellants maintain that the statute does not articulate the harm resulting from the existence of a chain store organization or consumer perception of this existence. The Appellants also contend that because the DBR would allow the use of the full, legal name of the individual owner associated with the name of the l[illegible]ensee, the DBR has acted arbitrarily by allowing, for example, the

use of "Kathleen Haronian's Douglas Wine & Spirits-North Providence, Inc." but not "Douglas Wine & Spirits-North Providence." The Appellants allege that there is no difference in the two names, and, therefore, the criteria used by the DBR to enforce the statute are arbitrary.

In evaluating the facts of the case, the Hearing Officer found that DBR Bulletin 2005-2 had "clearly set forth guidelines to allow entities and individuals to distinguish their names to minimize the use of a chain or common entity." (DBR Decision at 14.) The Hearing Officer also held that the names currently used by the Appellants "are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of [G.L. 1956] § 3-5-11(b)(1)(vi)." (*Id.* at 15.) The Hearing Officer also considered the factual arguments asserted by the Appellants regarding alternative means of enforcement and rejected their proposals to add "independently owned and operated" and "not a chain store" to the business names, because the presence of any similar term or name identified as a chain or common entity among entities sends mixed messages to the consumer and is not a reasonable application of § 3-5-11(b)(1)(vi) prohibitions. (*Id.* at 18.)

"The law in Rhode Island is well-settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." *State v. Cluley,* 808 A.2d 1098, 1103 (R.I. 2002) (quoting *In re Lallo,* 768 A.2d 921, 926 (R.I. 2001)). "Use of the arbitrary and capricious standard means that reviewing courts will uphold administrative decisions ... as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence." *Goncalves v. NMU*

Pension Trust, 818 A.2d 678, 682-683 (citing *Doyle v. Paul Revere Life Insurance Co.,* 144 F.3d 181, 184 (1st Cir. 1998)). Deference must also be given to an agency's interpretation even if the statute is ambiguous. *See Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket,* 622 A.2d 452, 456-457 ("Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied.").

In matters of statutory interpretation, the Rhode Island Supreme Court has consistently held that the courts' "ultimate goal is to give effect to the purpose of the act as intended by the Legislature." *Silva v. Fitzpatrick,* 913 A.2d 1060, 1063 (R.I. 2007) (quoting *Webster v. Perotta,* 774 A.2d 68, 75 (R.I. 2001)). In order to effectuate the intent of the Legislature, courts must examine a statute "in its entirety and [attribute] to words their plain and ordinary meaning." *LePage v. Babcock,* 839 A.2d 1226, 1230 (R.I. 2004) (citing *Kent County Mental Health Center, Inc. v. Cavanaugh,* 659 A.2d 120, 122 (R.I. 1995)). Additionally, courts "shall not ascribe to the Legislature an intent to enact legislation that is devoid of any purpose, is inefficacious, or is nugatory." *Pullen v. State,* 707 A.2d 686, 691 (R.I. 1998) (quoting *Cocchini v. City of Providence,* 479 A.2d 108, 111 (R.I. 1984)). In cases of ambiguous statutory language, courts must then consider legislative intent. *Providence Journal Co. v. Rodgers,* 711 A.2d 1131, 1134 (R.I. 1998). In interpreting a legislative enactment, courts will "determine and effectuate the Legislature's intent" and "attribute to the enactment the meaning most consistent with [the Legislature's] policies or obvious purposes." *Park v. Ford Motor Co.,* 844 A.2d 687, 692 (R.I. 2004) (quoting *Dias v. Cinquegrana,* 727 A.2d 198, 199-200 (R.I. 1999)).

As noted by the DBR Hearing Officer, in Title 3 of the General Laws of Rhode Island – entitled "Alcoholic Beverages" – the Rhode Island General Assembly adopted a comprehensive statutory scheme to regulate many facets of the liquor industry within this state.[2] (DBR Decision at 12.) The provisions of Title 3 reflect legislative intent to control, regulate, penalize, and monitor activities related to alcohol. (*Id.*) Section 3-1-5, for example, states that "[t]his title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." (*Id.*) Furthermore, § 3-2-2 gives the DBR "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." (*Id.*) Under § 3-5-1 *et seq.*, the DBR's supervisory authority extends to regulating licenses for the manufacture, sale or importation of alcoholic beverages. (*Id.*)

In light of the regulatory authority granted to the DBR, the DBR Hearing Officer analyzed the purpose and scope of the statutes at issue, §§ 3-5-11(b)(1)(vi) and 3-5-11.1 (prohibiting liquor franchises), in the context of Title 3's statutory scheme. (*Id.*) Section 3-5-11.1 states that the liquor franchise prohibition "promote[s] the effective and

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[2] The regulatory measures of Title 3 include: Chapter 4 – Transportation of Beverages; Chapter 5 – Licenses (including, state and local licensing provisions, limitations on the number of licenses that a licensee may hold, and manufacturer and wholesaler licenses); Chapter 6 – Manufacturing and Wholesale Licenses; Chapter 7 – Retail Licenses; Chapter 8 – Regulation of Sales; Chapter 9 – Adulterated Liquors; Chapter 10 – Taxation of Beverages; Chapters 11 and 12 – Penalties and Liabilities and Enforcement of Title; Chapter 13 – Malt Beverage Supplier-Wholesaler Agreements; and Chapter 14 – The Rhode Island Liquor Liability Act.

reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." (*Id.*) As noted by the Hearing Officer, this statutory scheme, coupled with the statutory definition of "chain store organization" under R.I. Gen. Laws § 3-5-11(b)(1)(vi), provides the legislative basis for Department to regulate the sale of liquor by limiting the names or other terms used by licensees identified as a chain or common entity. (*Id.*)

The Hearing Officer also correctly observed that the Rhode Island Supreme Court has consistently upheld the DBR's authority to regulate the liquor industry. (*Id.*) The Supreme Court confirmed that Rhode Island's Liquor Control Administrator – subsequently replaced by the DBR – serves as a "superlicensing board" with a broad and comprehensive power of review. *Hallene v. Smith,* 201 A.2d 921, 924 (R.I. 1964) (holding that *de novo* review is necessary to fulfill the legislative intent to "provide broad and comprehensive control by the State over the liquor traffic and to vest that control in an administrative body"); *Tedford v. Reynolds,* 141 A.2d 264, 267 (R.I. 1958); *Baginski v. Alcoholic Beverage Commission,* 4 A.2d 265, 268 (R.I. 1939). *See Clark v. Alcoholic Beverage Comm'n,* 170 A. 79, 80 (R.I. 1934). This authority derives in part from the general supervisory authority in matters related to liquor licensing vested in the DBR through §§ 3-1-5 and 3-2-2. *See Thompson v. Town of East Greenwich,* 512 A.2d 837, 842 (R.I. 1986). The General Assembly vested this authority in the DBR, because an "unsupervised system of local regulation" and a "lack of uniformity" in administering the law would result in "grave abuses which, as a matter of common knowledge, seriously [affect] public welfare."

Baginski, 4 A.2d at 267. The Rhode Island Supreme Court has stated that the legislature expressly provided for state control and has adopted a system for administering such control in the manner that it deems the most likely to be productive of the public good. *Bd. of License Commissioners v. Daneker,* 79 A.2d 614, 617 (R.I. 1951). This Court concurs with the Hearing Officer's analysis that §§ 3-5-11 and 3-5-11.1 create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcoholic beverages consistent with the legislative intent of Title 3. (DBR Decision at 15.) Therefore, the DBR has the statutory mandate to determine whether Class A liquor licensees are operating as a "chain store organization" by using a term or name identified as a chain or common entity and determine an appropriate penalty for such prohibited activity. (*Id.*)

In DBR Bulletin 2005-2 and its December 15, 2005, amendment, the DBR promulgated guidelines for entities and individuals to distinguish their names to minimize the use of a chain or common entity. (*Id.*) As stated in the Bulletin, the DBR did not consider the adding of a location to an existing similar business name a sufficient differentiation. (*Id.*) Here, however, the Appellants proceeded to change their business names to increase their similarity to one another by adding locations in Rhode Island to identical business names – for example, Douglas Wine & Spirits – 44 and Douglas Wine & Spirits – Johnston. The Appellants argue that Paragraph 4 of the Bulletin allowed the use of a "full proper legal name," including their shared corporate name. However, this Court notes that the clear context of the example given in that paragraph indicates that the DBR intended to apply the "full proper legal name" standard to the name of an individual person,

not the name of a business entity. Here, the Appellants' name changes only serve to make their business names more similar and more indicative of a chain, thereby conflicting with the overall statutory intent.

As noted by the Hearing Officer, the DBR intended the criteria enunciated in the Bulletin "to inform its licensees and assist them in the enforcement of the statutory mandate while recognizing that some of the licensees had a personal stake in their businesses." (DBR Decision at 16.) Thus, the DBR allowed the "full proper legal name" of individuals to be attached to the name of the licensee. (*Id.*) Furthermore, the use of individual names clearly ties the license to an individual as distinguished from a business entity. The DBR Bulletin remains consistent with the requirements of § 3-5-11(b)(1)(vi), because consumers will more likely view a business entity name without reference to an individual's full proper name as a "chain or common entity." (*Id.*) Thus, the Appellants' current business names actually demonstrate the rationale for requiring distinguishable names in order to prevent consumer misperception that the Appellants' businesses were chain stores or common entities. (*Id.*)

The names currently used by the Appellants are not easily distinguishable, thereby violating § 3-5-11(b)(1)(vi). Therefore, the DBR Hearing Officer did not abuse her discretion in furthering Title 3's statutory scheme by finding that the Appellants violated DBR regulations. As the Hearing Officer noted, the names currently used by the Appellants "are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi)." (*Id.*) Upon a thorough examination of the entire record, this Court finds

that the Hearing Officer's findings were not arbitrary and capricious or marked by an abuse of discretion.

II
Appellants' Constitutional Claims

In addition to proceedings before the DBR, three of the Appellants in the instant matter – Douglas Wine & Spirits Cumberland, Douglas Wine & Spirits North Providence, and Douglas Wine & Spirits Cranston – filed suit against the State of Rhode Island in the United States District Court for the District of Rhode Island. In their federal case, the three Class A liquor licensees claimed that G.L. 1956 § 3-5-11(b)(1)(vi) violated their constitutional rights. The District Court rejected all the licensees' claims and held that § 3-5-11(b)(1)(vi) did not violate the licensees' rights. On appeal before the United States Court of Appeals for the First Circuit, the First Circuit affirmed the District Court decision and rejected all the licensees' constitutional challenges. These three licensees now join their fellow franchisees in appealing the DBR decision on largely identical constitutional grounds.

The doctrine of res judicata, or "claim preclusion," renders "a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or, that could have been presented and litigated therein." *Waters v. Magee,* 877 A.2d 658, 666 (R.I. 2005) (citing *Ritter v. Mantissa Investment Corp.,* 864 A.2d 601, 605 (R.I. 2005) (internal citations omitted)). Under res judicata, "[a] party defeated in one action cannot maintain a second action based on a ground which could properly have been, but was not, set forth and relied upon in the former action." *Johnston*

Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 808 (citing *El Gabri v. Lekas,* 681 A.2d 271, 275 (R.I. 1996) (internal citations omitted)). The doctrine "serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action." *Mills v. Toselli,* 916 A.2d 756, 757 (quoting *El Gabri,* 681 A.2d at 275 (internal citations omitted)). This Court will apply the preclusive effect of the res judicata doctrine to "all or any part of the transaction, or series of connected transactions, out of which the action arose." *El Gabri,* 681 A.2d at 276 (quoting Restatement (Second) of Judgments § 24 (1982)).

In contrast, the doctrine of collateral estoppel makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action. *Foster: Glocester Reg'l Sch. Comm. v. Bd. of Review,* 854 A.2d 1008, 1014 (quoting *E.W. Audet & Sons, Inc. v. Firemen's Fund Insurance Co. of Newark, New Jersey,* 635 A.2d 1181, 1186 (R.I. 1994) (internal citations omitted)). "Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *State v. Santiago,* 847 A.2d 252, 254 (R.I. 2004) (quoting *State v. Hie,* 688 A.2d 283, 284 (R.I. 1996)). Collateral estoppel requires "(1) that there [was] an identity of issues, (2) that the prior proceeding resulted in a final judgment on the merits, and (3) that the party against whom collateral estoppel is asserted [was] the same as or in privity with a party in the prior proceeding." *State v. Pacheco,* 763 A.2d 971, 980 (quoting *E.W. Audet & Sons, Inc.,* 635 A.2d at 1186). In order to meet the identity of issues requirement for preclusion, the issue: (1) must be identical to an issue

determined in an earlier proceeding; (2) must actually have been litigated in a prior proceeding; and (3) must necessarily have been decided. *State v. Godette,* 751 A.2d 742, 746 (citing *Hie*, 688 A.2d at 285).

In four decisions arising from the same issues, the federal courts have consistently decided against the Appellants' constitutional claims. Federal judges have heard and ruled on all issues raised here on appeal, and all parties to this appeal were either parties to one or more of the federal actions or in privity with one or more of the parties. Parties are in privity when "there is a commonality of interest between the two entities' [sic] and when they 'sufficiently represent' each other's interests." *Duffy v. Milder,* 896 A.2d 27, 36 (R.I. 2006) (quoting *Commercial Union Insurance Co. v. Pelchat,* 727 A.2d 676, 680 (R.I. 1999)). As fellow franchisees with identical legal interests in both the federal and state proceedings, all the Appellants in this case are in privity with the licensees who joined the franchisor in the federal complaint. In essence, the Appellants have had their day in court.

The appellants received a full federal bench trial before the District Court in Rhode Island. The District Court held that DBR policies banning the licensees' use of the same or similar business names pursuant to G.L. 1956 § 3-5-11(b)(1)(vi) did not violate any provisions of the United States Constitution. First, this ban did not implicate the licensees' First Amendment rights to freedom of speech or association by prohibiting common advertising and the use of a common name. (Tr. District Court Decision at 12.) Section 3-5-11(b)(1)(vi) of the Rhode Island General Laws does not prevent Class A licensees from using any name that they choose as long as it does not identify them as a chain store entity, since the statute does not restrict the

message that may be conveyed by the stores. The statute solely targets the licensees' collaboration in setting products and prices – the precursor to any common advertising. As noted by the Federal District Court,

> [t]here is no other reason to use a common name unless that's the case. Indeed, the evidence shows that this is precisely the means that the plaintiffs have used in order to circumvent the statutory prohibition against chain stores or franchise operations.

(Federal District Court Decision at 13-14.) The Federal District Court also noted that the use of a common name did not constitute protected commercial speech.

> [C]ommon advertising or the use of a common name, which has no independent expressive significance and amounts to nothing more than a means for carrying out the concerted activity, . . . is prohibited by statute. To put it another way, common advertising and the use of a common name not only concerns unlawful activity, it is part and parcel of the unlawful activity.

(Tr. District Court Decision at 17.) Thus, the Federal District Court held the use of that name would unlawfully mislead consumers, because a common name conveys the message that the licensees' stores are members of a chain.

On appeal, the First Circuit affirmed the District Court's findings and determined that these findings were not clearly erroneous. According to the First Circuit, the District Court's findings

> graphically illustrate why the use of a shared trade name in the retail liquor market by supposedly independent package stores poses an

> area of legitimate concern for a state that has abolished franchise and chain-store arrangements in that market. The findings, therefore, comprise a showing sufficient to underpin the restriction enacted by the Rhode Island General Assembly.

Wine & Spirits Retailers (III), 481 F.3d at 9. Thus, banning the use of common names does not impinge on any of the Appellants' First Amendment rights.

The District Court also held that the licensees "failed to come close" to showing that G.L. 1956 § 3-5-11(b)(I)(vi) violated the licensees' rights under the Commerce Clause of the United States Constitution. *See* U.S. Const. art. I, § 8. According to the District Court, G.L. 1956 § 3-5-11 does not facially discriminate against interstate commerce or out-of-state interests. (Tr. District Court Decision at 21.) "The statutory prohibitions against the sale of liquor by chain store organizations and/or franchise operations make no distinction whatever between in-state entities and out-of-state entities," because they apply across the board regardless of whether the chain store or franchisee is local or out-of-state. (*Id.*)

Furthermore, the District Court found no compelling evidence of discriminatory effect. During their federal trial, the licensees relied on *Walgreen Co. v. Rullan,* 405 F.3d 50 (1st Cir. 2005). In Walgreen, a commonwealth statute in Puerto Rico exempted existing pharmacies – roughly 92% of which were locally owned – from complying with a set of facially neutral statutory requirements. *Walgreen,* 405 F.3d at 55-56. The statute also allowed those "grandfathered" pharmacies to wield great influence in the enforcement of the statutory requirements as applied to new entrants. *Id.* Statistical data adduced at

trial "strongly indicate[d]" that the statute suppressed competition and favored local interests. *Id.* at 56. In the licensees' federal trial, however, the licensees failed to provide evidence that Rhode Island's prohibition on franchise and chain-store arrangements has had, or threatens to have, a debilitating or unfair impact either on competition in general or on out-of-state enterprises in particular. As noted by the Federal District Court, "Rhode Island licensees, and in particular local licensees, do not wield any power to delay or deny competition by franchise operations or chain store organizations either out-of state or in-state." (Tr. District Court Decision at 24.)

During the licensees' federal appeal, the First Circuit affirmed the District Court's findings regarding the alleged violation of the licensees' rights under the Commerce Clause. The First Circuit held that "the statutory scheme at issue here does not favor in-state interests at all." *Wine & Spirits Retailers (III),* 481 F.3d at 14. Furthermore, "a state regulation that burdens some interstate firms 'does not, by itself, establish a claim of discrimination against interstate commerce.'" *Id.* at 14-15 (quoting *Exxon Corp. v. Gov. of Md.,* 437 U.S. 117, 126 (1978)). Although the laws enacted by the Rhode Island General Assembly may have had a negative impact on Wine & Spirit's business model, this effect alone is not sufficient to show discriminatory effect. *Id.* at 15. According to the First Circuit, the plaintiffs merely showed that the statutes'

> neutral, evenhanded requirements . . . incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market. That is not enough. In order to invalidate the requirements, any such burden

> would have to be "clearly excessive in relation to the putative local benefits."

Id. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). On the grounds of res judicata, this Court holds that the federal court findings regarding the alleged Commerce Clause violations are dispositive.

The District Court next addressed and rejected the licensees' claim that the statute constituted an unconstitutional taking of private property in violation of the Fifth Amendment. The District Court found that the licensees had no reasonable investment-backed property rights, because the licensees never had any "right" to engage in the franchise sale of liquor, since Rhode Island has prohibited chain stores from possessing Class A liquor licenses since 1933. (Tr. District Court Decision at 27.) Although the DBR's franchise division approved the franchise agreement, the District Court determined that

> the franchise division has no regulatory responsibilities with respect to liquor sales, and apparently was unaware of the prohibition against franchise sales of liquors, was unaware that under Rhode Island law franchise sales of liquor is treated differently from franchise sales of other products.

(*Id.* at 28.) Furthermore, the statute does not prohibit the licensees from operating liquor stores, so no regulatory taking occurred in this case. Finally, the District Court disposed of the licensees' taking claim by noting that the liquor industry is heavily regulated, and therefore "it [is] unreasonable to expect that the regulations governing liquor sales will not be amended from time to time when necessary to close loopholes or to further the goals of the regulation." (Tr. District Court Decision at 29.) Although

the First Circuit did not address the Fifth Amendment taking issue on appeal, this Court finds that on the basis of collateral estoppel, the Appellants' federal proceedings preclude this Court from ruling on this claim.

Finally, the District Court addressed the licensees' Equal Protection claims and determined that G.L. 1956 § 3-5-11 did not violate the licensees' constitutional rights. "The Rhode Island statute is economic legislation that does not employ suspect classifications or impinge on fundamental rights." (*Id.* at 30.) The licensees did not show that the statute discriminates against Class A retail liquor stores, because the statute treats all Class A licensees the same, and Class A licensees are not so similarly situated to businesses like wineries and beerpubs [sic] that the difference in treatment is arbitrary and irrational. (*Id.* at 30-31.) Additionally, multiple Class A liquor licensees using an identical family name do not violate the statute, because these stores do not "engage in common advertising, common pricing or any of the other concerted activities in which the [licensees] engage." (*Id.* at 33.) The District Court found that allowing individual licensees to use a common family name, but denying other stores to use names differentiated only by geography, was not arbitrary or irrational. (*Id.*) According to the District Court,

> Rhode Island did not act irrationally in prohibiting sales by chain store organizations and/or franchise operations; that as evidenced by the techniques utilized by plaintiffs in attempting to circumvent that ban, the prohibitions in Section 3-5-11 of concerted activities characteristic of chain store operations are necessary to implement that ban; that those prohibitions do not infringe on any of the plaintiffs constitutionally

> protected rights of speech and/or association; that the statute does not discriminate against interstate commerce; that neither the statute or [sic] the manner in which it is interpreted or enforced violates the plaintiffs right to equal protection; and that the ban does not constitute any taking of any property of the plaintiffs.

(*Id.* at 34). On appeal, the First Circuit applied rational basis scrutiny to the licensees' equal protection challenges to Rhode Island's economic legislation. *See Wine & Spirits (II)*, 418 F.3d at 53 (citing *Hodel v. Indiana,* 452 U.S. 314, 331 (1981)). Using rational basis scrutiny, the First Circuit upheld G.L. 1956 § 3-5-11, because the means chosen by the General Assembly were rationally related to a legitimate government purpose: "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." *Wine & Spirits (III),* 481 F.3d at 13 (citing G.L. 1956 § 3-1-5). Accordingly, this Court is collaterally estopped from reconsidering the ruling of the federal courts on this matter.

CONCLUSION

After review of the entire available record, the Court holds that the Hearing Officer based her decisions on reliable, probative, and substantial evidence and her findings were not affected by error of law. The agency decision was not arbitrary or capricious, and they did not result from any abuse of discretion by the Hearing Officer. Thus, Appellants' substantial rights have not been prejudiced. Furthermore, the federal courts have rendered final judgment on the merits with regard to the Appellants' constitutional claims. Pursuant to the doctrines of res judicata and collateral estoppel, this Court will not disturb

the federal court decisions. For the reasons stated above, this Court affirms the Hearing Officer's decisions finding that Appellant violated G.L. 1956 § 3-5-11(b)(1)(vi).

Counsel for appellee shall prepare an appropriate judgment for entry.